Supreme Court, U. S.
FILED
APR 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-539

DAYTON BOARD OF EDUCATION, et al., *Petitioners,*

v.

MARK BRINKMAN, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS

PRELIMINARY STATEMENT

At least two good things are happening in Dayton, Ohio, this school year for the first time ever. Black and white children are attending public school together in significant numbers, and their attendance in this fashion is pursuant to a desegregation plan which is fair and equitable to both races and demeaning to neither. Second, the Equal Protection Clause of the Fourteenth Amendment to the Constitution as applicable to public education is receiving substantial vindication in the Dayton school district. These happy re-

sults derive from unhappy circumstances; longstanding policies and practices of *de jure* segregation requiring federal judicial intervention. This lawsuit has, to date, produced numerous hearings, opinions and orders in the district court, three appeals and one denial of certiorari. The case appears considerably more complex than it actually is, however, primarily because the district judge grappled most ineffectively with settled constitutional principles and terminology and most reluctantly with the facts. But the essential determinative facts have been found by the courts below or they are uncontestable. On the basis of these facts, the United States Court of Appeals for the Sixth Circuit Court has, on three separate occasions, adjudged plaintiffs' constitutional right to a system-wide remedial plan of pupil desegregation based on the nature and extent of the violation. *Brinkman* v. *Gilligan,* 503 F.2d 684 (6th Cir. 1974) [hereinafter, "*Brinkman I*"]; 518 F.2d 583 (6th Cir.) ["*Brinkman II*"], *cert. denied sub nom.,* 423 U.S. 1000 (1975); 539 F.2d 1084 (6th Cir. 1976) ["*Brinkman III*"], *cert. granted sub nom.,* —— U.S. — (1977) (the instant case). Following *Brinkman II* the district court appointed a Master and, upon receipt of his report, ordered into effect a plan of desegregation which has considerable potential for uprooting two-thirds of a century of unabated state-inflicted racial separation in the Dayton public schools. That plan has been approved in *Brinkman III* as a fair, sensitive, flexible and otherwise equitable response to the entrenched constitutional wrong.

In proper perspective, therefore, this case raises the following:

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Dayton Board of Education meet its burden of showing that it dismantled the basically dual school system inherited at the time of *Brown* v. *Board of Education,* 347 U.S. 483 (1954), following which the system-wide racial segregation extant at the time of trial adventitiously reappeared?

2. Did the Dayton Board, under *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973), rebut plaintiffs' *prima facie* case of system-wide intentional segregation?

3. If the Dayton Board failed to meet either of these burdens, did the system-wide remedial plan of pupil desegregation approved below require a fixed racial balance or otherwise constitute an abuse of equitable discretion?

4. Do plaintiffs have standing to bring this action in their own right and as representatives of the class?

STATEMENT OF THE CASE

A. Prior Proceedings

Black and white parents and their minor children attending the Dayton, Ohio public schools, and the Dayton Branch of the National Association for the Advancement of Colored People [hereinafter, "plaintiffs"], filed their complaint April 17, 1972 in the United States District Court for the Southern District of Ohio. Defendants included the Dayton Board of Education and its individual members, and the Superintendent of the Dayton Public Schools [hereinafter "petitioners" or "Dayton Board" or "Board"], and the Governor, Attorney General, State Board of Edu-

cation and Superintendent of Public Instruction of Ohio [hereinafter, "State defendants"].[1] Plaintiffs alleged that all of these defendants were responsible for operating a racially segregated public school system in violation of the Fourteenth Amendment and federal civil rights statutes, 42 U.S.C. §§ 1981, 1983-1988, and 2000d.

Trial limited by the district court to whether the Dayton public schools are unlawfully segregated by race pursuant to actions of the Dayton Board began November 13, 1972 and concluded on December 1. On February 7, 1973 the district court issued its Findings of Fact and Memorandum Opinion of Law concluding that various actions on the part of the Dayton Board defendants and their predecessors "are cumulatively in violation of the Equal Protection Clause." A.12.[2] The Court thereupon ordered the Dayton Board to

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[1] The State defendants are not parties to this appeal, as no orders have been entered against them below. The State Superintendent and the State Board of Education have, however, filed an *amicus* brief with this Court, the principal purpose of which appears to be to get this Court to prejudge an issue now pending in the district court: a motion filed by the Dayton Board seeking an order requiring the State defendants to participate in the implementation of the desegregation plan ordered below. We caution only that the figures set out in the State Board's *amicus* brief (pp. 2-3) have not been tested in the adversary process, and no assumptions about them are warranted.

[2] "A. ——" references are to the printed two-volume appendix. With respect to matters not included in the appendix, we cite to the original record in the same manner employed by petitioners. *See* Pet. Br. at 17n.1. "R.I." refers to the pages in the consecutively-paginated twenty-volume transcript of the November-December, 1972 violation trial; "R.II." to the transcript of the February 1975 remedial hearing; and "R.III." to the December 1975 and March 1976 remedial hearing. "PX" refers to plaintiffs' evidentiary exhibits and "DX" to those of defendants.

submit a remedial plan of desegregation; the Dayton Board purported to comply through a submission of March 29, 1973. A.131-44. By its Supplemental Order on Remedy filed July 13, 1973 (A.25-31), the district court, while expressing disappointment at the Board's submission, approved the Board's limited proposal on a tentative basis. Both plaintiffs and defendants appealed.

On August 20, 1974 the Court of Appeals for the Sixth Circuit filed its opinion in *Brinkman I,* 503 F.2d 684 (A.32-69). The court of appeals affirmed the district court's finding that the Dayton school system was being operated in violation of the Constitution, but the court of appeals also concluded that the Board's proposed cure for that violation was inadequate in light of the scope of the violation. A.68. Accordingly, the case was remanded to the district court to formulate a constitutionally adequate desegregation plan. The Dayton Board did not seek review in this Court of the judgment in *Brinkman I.*

On remand the district court, by order of January 7, 1975 (A.70-72), directed the submission of new desegregation plans, upon which (A.144, 154) a hearing was held on February 17, 19 and 20, 1975. On March 10, 1975 the district court entered an Order provisionally adopting another limited plan submitted by the Board. A.73-84. The plaintiffs immediately appealed seeking summary reversal on the ground that the plan and the reasoning adopted by the district court were plainly inadequate and in direct conflict with the mandate of the court of appeals.

On June 24, 1975 the court of appeals issued its opinion in *Brinkman II,* 518 F.2d 853 (A.89-96). The court denied plaintiffs' motion for summary reversal

because of the short time remaining before commencement of the 1975-76 school year; but the court remanded the case with directions that the district court "adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this Court and to the decisions of the Supreme Court in *Keyes* and *Swann*." A.96. The court of appeals directed that its mandate issue forthwith. The Dayton Board sought review in this Court, and certiorari was denied on December 1, 1975. 423 U.S. 1000. On remand, following evidentiary hearings and the appointment of a Master, the district court entered an order on March 23 (A.110-13) and a judgment on March 25 (A. 114-16), modified by order of May 14, 1976 (A.117), essentially adopting the desegregation plan recommended by the Master but granting the Board the option to implement equally effective alternatives.

Defendants' appeal was heard on an expedited basis, and the court of appeals issued its decision in *Brinkman III* on July 26, 1976, 539 F.2d 1084 (A.118-23). The court rejected the Board's objections to the plan of desegregation approved by the district court. The court of appeals and Circuit Justice Stewart denied the Board's applications for stay on August 16 and August 19, 1976, respectively. The plan thus became operative at the start of the 1976-77 school year, as required by *Brinkman II* and confirmed by *Brinkman III*. This Court granted the Dayton Board's petition for a writ of certiorari on January 17, 1977.

The various opinions and orders below will be described in greater detail as they appear chronologically in the remainder of this Statement. Part B provides a summary overview of the Dayton school district. Parts C and D below then describe the facts adduced at the

November 1975 violation trial. (The facts relating to violation issues which have been reserved for decision by the court of appeals are summarized in Appendix A, attached hereto.) The remaining parts summarize the lower courts' opinions and orders, as well as the facts adduced at the remedial hearings which are pertinent to the disposition of the case in this Court.

B. The Dayton District

As reflected in the report (A.157-58) of the Master appointed by the district court, the city of Dayton, Ohio, has a population of 245,000 and is located in the east-central part of Montgomery County in the southwestern part of the state of Ohio, approximately 50 miles due north of Cincinnati. The Dayton school district is not coterminus with the city; some parts of the school district include portions of three surrounding townships and one village, while some portions of the city are included in the school districts of three adjacent townships. The total population residing within the Dayton school district boundaries is 268,000; the school pupil population in 45,000, slightly less than 50% of whom are black. Prior to implementation of the desegregation plan here at issue, the vast majority of black and white pupils had separately attended schools either virtually all-white or all-black in their pupil racial composition. *E.g.*, A. 49-51, 311-315 (PX 2A-2E), 502-506 (PX 100A-100E), 588-589 (DXCU).

The Dayton district is bisected on a north/south line by the Great Miami River. Historically, the black population has been concentrated in the south-central and southwest parts of the city, primarily on the west side of the Miami River and south of the east-west Wolf Creek. *See* A.577-79 (1940, 1950 and 1960 census

tract maps). The black population continues to be concentrated in the southwest quadrant, but there is now also a substantial black population in the northwest quadrant across Wolf Creek. Extreme northwest Dayton and most of the city east of the Miami River are and have been heavily white in residential racial composition. *See* A.580 (1970 census tract map).

Geographically and topographically there are no major obstacles to complete desegregation of the Dayton school district. A.121. The Master determined that where pupil transportation is necessary, the maximum travel time would be about twenty minutes. A.162. As found by the Board's experts, due to the compact nature of the system, "the relative closeness of the Dayton Schools makes long-haul transportation[,] an issue in many cities[,] moot here." A.304. Thus, there is no issue whether the time or distance of transportation is here excessive or otherwise poses any threat to the health or education of pupils.

C. The Pre-*Brown* Dual System

In 1887 the state of Ohio repealed its school segregation law and attempted to legislate the abolition of separate schools for white and black children. 85 Ohio Laws 34. That statute was sustained the following year by the Supreme Court of Ohio. *Board of Education* v. *State*, 45 Ohio St. 555, 16 N.E. 373 (1888). The laudable goals of that legislation were not attained in Dayton until the current school year.

The facts of racial segregation in the Dayton public schools, as revealed by the record before the Court, begin in 1912.[3] In that year school authorities assigned

[3] Many of the facts set forth in this part of the statement were admitted by all Dayton Board defendants in their responses to

Louise Troy, a black teacher, to a class of all-black pupils just inside the rear door of the Garfield school; all other classes in this brick building were occupied by white pupils and white teachers. About five years later, four black teachers and all of the black pupils at Garfield were assigned to a four-room frame house located in the back of the brick Garfield school building with its all-white classes. Shortly thereafter, a two-room portable was added to the black "annex" making six black classrooms and six black teachers located in the shadow of the white Garfield school. A four-room "permanent" structure was later substituted (about 1921 or 1922), and eight black teachers were thus assigned to the eight all-black classrooms in the Garfield annex. A.209-11.[4]

About 1925 school authorities learned that two black children, Robert Reese and his sister, had been at-

plaintiffs' pre-trial Requests for Admissions, served on October 13, 1972. The Superintendent and three Board members filed responses separate from those of the Board and its four "majority" members. These facts were also the subject of extensive and largely uncontroverted evidence at trial.

[4] In 1917 the black classes in the black annex at Garfield contained about 50 black children per room. A.210. Thereafter, Mrs. Ella Lowrey, a black teacher for several decades in the Dayton system, taught a class of 42 black children when white teachers inside the brick building had classes of only 20 white pupils. A.211.

Mrs. Lowrey's service began in 1916 and continued through 1963, with several years' interruption at various times. In her words, "doing 40 years service in all in Dayton, . . . I never taught a white child in all that time. I was always in black schools, black children, with black teachers." A.215. (At one time during this early history prior to 1931, one black teacher, Maude Walker, taught an ungraded class of all-black boys at the Weaver school. All other black teachers in the system were assigned to the black annex at Garfield. A. 186.)

tending the Central school under a false address, even though they lived near the Garfield school. They had accomplished this subterfuge by walking across a bridge over the Miami River River. A.197.[5] The Reese children were ordered by school authorities to return to the Garfield school, but their father refused to send them to the black Garfield annex. Instead, he filed a lawsuit in state court seeking a writ of mandamus to compel Dayton school authorities to admit children of the Negro race to public schools on equal terms with white children. A. 198. In a decision entered of record on December 24, 1925, the Court of Appeals of Ohio denied a demurrer to the mandamus petition. This decision was affirmed by the Ohio Supreme Court and

[5] During this time, there apparently were some other black children also in "mixed" schools. For example, Mrs. Phyllis Greer attended "mixed" classes at Roosevelt high school for three years prior to 1933. A.182. But even when they were allowed to attend so-called "mixed" schools, black children were subjected to humiliating discriminatory experiences within school. At Roosevelt, for example, black children were not allowed to go into the swimming pool and blacks had separate showers while Mrs. Greer was there (A. 183-83); while Robert Reese was at Roosevelt, there were racially separate locker rooms and blacks were allowed to use the swimming pool, but not on the same day whites used it A.198-99. At Steele High School, black children were not allowed to use the pool at all during this period. A.290-91.

Even in the "mixed" classrooms black children could not escape the official determination that they were inferior beings because of the color of their skin. Mrs. Greer vividly remembers, for example, "when I went to an eighth grade social studies class I was told by a teacher, whose name I still remember, . . . that even though I was a good student I was not to sit in front of the class because most of the colored kids sat in the back." A.183. And she remembers with equal clarity that, while in the second grade at Weaver, she "tried out for a Christmas play and my teacher wanted me to take the part of an angel and the teacher who was in charge of the play indicated that I could not be an angel . . . because there were no colored angels." R.I.479.

Dayton school authorities were specifically reminded that state law prohibited distinctions in public schooling on the basis of race. *Board of Education of School District of City of Dayton* v. *State ex rel. Reese,* 114 Ohio St. 188, 151 N.E. 39 (1926).

Following this state court decision Robert Reese and a few of his black classmates were allowed to attend school in the brick Garfield building, but the black annex and the white brick building were otherwise maintained. Black children were allowed to attend classes in the brick building only if they asserted themselves and specifically so requested. A.212-13. Otherwise, they "were assigned to the black teachers in the black annex and the black classes." A.213.[6]

The black pupil population continued to grow at Garfield, and another black teacher was hired and assigned with an all-black class placed at the rear door of the brick building. A.213. In 1932 or 1933, Mrs. Lowrey (*see* note 4, *supra*), was also placed in the brick building, again with an all-black class "in a little cubbyhole upstairs," making ten black teachers with ten black classes at Garfield. A.214. Finally, around 1935-36, after most of the white children had transferred out of Garfield, school authorities transferred all the remaining white teachers and pupils in the brick building to other schools and assigned an all-

[6] During the pendency of the Reese case, the eight black teachers assigned to the Garfield annex were employed on a day-to-day basis because school authorities did not know whether the black teachers were going to be in the Dayton system after the lawsuit. Black teachers would not be needed if the courts required the elimination of all-black classes, since the Board deemed black teachers unfit to teach white children under any circumstances. A.211-12.

black faculty and student body to Garfield. A.186-187, 214-15, 524 (PX 150 I); PX 155 (faculty directories).[7]

But the black pupil population was growing during these years, and even the conversion of Garfield into a blacks-only school was not sufficient to accommodate the growth. So, with the state court decision in the Reese case now eight years old, the Dayton Board converted the Willard school into a black school. The conversion process was as degrading and stigmatizing as had been the creation and maintenance of the Garfield annex and the ultimate conversion of the brick Garfield into a black school. In the 1934-35 school year, six black teachers (who were only allowed to teach black pupils) and ten white teachers had been assigned to the Willard school. In September of 1935, all white teachers and pupils were transferred to other schools, and Willard became another school for black teachers and black pupils only. A.186-87, 524 (PX 150 I); PX 155 (faculty directors).

At about this same time, the new Dunbar school, with grades 7-9, opened with an all-black staff and an all-black student body. A.524 (PX 150 I).[8] The Board

[7] Throughout this period and until 1954, black children from a mixed orphanage, Shawn Acres, were assigned across town to the black classes in the black Garfield school, while the white orphan children were assigned to nearby white classes and white schools. A.181-82. This practice was terminated following the *Brown* decision in 1954 at a time when the black community in Dayton was putting pressure on the school administration to stop mistreating black children. A.483 (PX 28).

[8] Mr. Lloyd Lewis, who was present at its inauguration, testified that the Dunbar school "was purposely put there to be all black the same as the one in Indianapolis [the Crispus Attucks school, *see United States* v. *Board of School Comm'rs*, 332 F. Supp. 655, 665 (S.D. Ind. 1971)] that I had left." R.I. 1378. Dunbar was

resolution opening Dunbar stated that grades 7 and 8 were to be discontinued at Willard and Garfield[9] and "that attendance at the . . . Dunbar School be optional for all junior high school students of the 7th, 8th, and 9th grade levels in the city." A.227, 539 (PX 161 A). Of course, this meant only all *black* junior high students, since Dunbar had an all-black staff who were not permitted by Board policy to teach white children. A.186, 228; PX 155 (faculty directors).

Within a very short time, grades ten, eleven and twelve were added to the black Dunbar school. Then in 1942, just two years after the Dayton school authorities had reorganized to a K-8, 9-12 grade structure, the Board again assigned the seventh grades from the all-black Willard and Garfield schools to the all-black Dunbar school. A.227, 520 (PX 161 B). Black children from both the far northwest and northeast sections of the school district traveled across town past many all-white schools to the Dunbar school. A.190; R.I. 1226-27. Many white children throughout the west side of Dayton were assigned to Roosevelt high school past or away from the closer but all-black Dunbar high school. *See* PX 47 (overlay of 1957 attendance boundaries).[10] Although some black children were allowed

also excluded from competition in the city athletic league until the late 1940's, thereby requiring Dunbar teams to travel long distances to compete with other black schools, even those located outside the state. A.183, 205-06; R.I.569-70.

[9] These two black elementary schools served grades 7 and 8, whereas the system prior to 1940 was otherwise generally organized on a K-6, 7-9, 10-12 grade-structure basis. R.I. 1871.

[10] Prior to 1940, no high schools had attendance boundaries. R.I.1886. The black Dunbar school was located in close proximity to the Roosevelt high school (*see* PX 47) which, although it always had space, apparently had too many black children. Along with

to attend Roosevelt, those who became "behavior problems" were transferred to Dunbar. A.184. And other black children from various elementary schools were either assigned, channeled, or encouraged to attend the black Dunbar high school. A.238-39, R.I. 574."

Even these segregative devices were not sufficient to contain the growing black pupil population. So between 1943 and 1945, the Board, by way of the same gross method utilized to convert the Willard school

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Steele and Stivers, these high schools were located roughly in the center of the city and served high school students throughout the city. (In addition, the Parker school had been a city-wide single-grade school which served ninth graders. R.I.1921-22; A.288-89.) In 1940 attendance boundaries were drawn for the high schools with the exception of Dunbar and a technical school (whose name varied), both of which long thereafter remained as city-wide schools. *See* note 22, *infra,* and accompanying text.

Dunbar continued until 1962 as a city-wide all-black high school. In that year the Dunbar building was converted into an elementary school (renamed McFarlane) with attendance boundaries drawn to take in most of the students previously attending the all-black Williard and Garfield schools, which were simultaneously closed. McFarlane opened with an all-black faculty and all-black pupil population. At the same time, a newly-constructed Dunbar high school opened with both asigned faculty and students over 90% black. A.315 (PX 2E), 316 (PX4), 508 (PX 130C), 248; PX3.

[11] The most effective means of forcing black children to attend the blacks-only Dunbar, of course, was the psychological one of branding them unsuited for association with white children. *See* note 5, *supra.* As Mr. Reese testified, he "chose" Dunbar over Roosevelt after suffering the humiliation of being assigned to separate locker rooms, separate showers, and separate swimming pools at Roosevelt: "I wanted to be free. I felt more at home at Dunbar than I did at Roosevelt . . . You couldn't segregate me at Dunbar." A.199. Similarily, Mrs. Greer testified: "I went to Dunbar because I felt that if there was going to be—if we were going to be separated by anything, we might as well be separated by an entire building as to be separated by practices." A.183.

into a black school, transformed the Wogaman school into a school officially designated unfit for whites. White pupils residing in the Wogaman attendance zone were transferred by bus to other schools, to which all-white staffs were assigned. By September 1945 the Board assigned a black principal and an all-black faculty with an all-black student population to the Wogaman school. A.183-84, 200, 524 (PX 150I); PX 155 faculty directories).

Still other official devices were used to keep blacks segregated in the public schools. One such device, resorted to regularly during the 1940's and early 1950's, was to cooperate with and supplement the discriminatory activities of Dayton public housing authorities. Throughout this period, racially-designated public housing projects were constructed and expanded in Dayton. A.178-79, 510 (PX 143 B). In 1942, the Board transferred the black students residing in the black DeSoto Bass public housing project to the Wogaman school (A.540 (PX 161 X)), and a later overflow to the all-black Willard school, rather than other schools that were equally close (A.185), while transferring white students from the white Parkside public housing project to the McGuffey and Webster schools and the eighth grades from those schools to the virtually all-white Kiser school. A.540. Then in the late 1940's and early 1950's, the Board leased space in white and black public housing projects for classroom purposes, and assigned students and teachers on a uniracial basis to the leased space so as to mirror the racial composition of the public housing projects. A.179-80, 513-23 (PX 143 J).

By the 1951-52 school year (the last year prior to 1964 for which enrollment data by race is available),

the Dayton Board was operating what southern educators would immediately recognize as a dual school system. During that year there were 35,000 pupils enrolled in the Dayton district, 19% of whom were black. There were four all-black schools, officially designated as such: Willard, Wogaman, Garfield and Dunbar. These schools had all-black faculties and (with one exception, an assignment made that school), *no* black teachers taught in any other schools. PX 3. In addition, there were 22 white schools with all-white faculties and all-white student bodies. And there was an additional set of 23 so-called "mixed" schools, 7 of which had less than 10 black pupils and only 11 of which had black pupil populations greater than 10% (ranging from 16% to 68%). A.506 (PX 100E). These latter schools were generally located in the area surrounding the location of the 4 designated all-black schools. These few schools with substantial racial mix, however, were marked by patterns of racially segregatory and discriminatory practices within the school, and, with the one exception noted above, none had any black teachers. Eighty-three percent of all white pupils attended schools that were 90% or more white in their pupil racial composition. Of the 6,628 black pupils in the system, 3,602 (or 54%) attended the four all-black schools with all-black staffs; and another 1,227 (or 19%) of the system's black pupils were assigned to the adjacent schools which were about to be converted into "black" schools (*see* note 12, *infra*, and accompanying text). Thus, 73% of all black students attended schools already or soon to be designated "black."

In December 1952 the Dayton Board confronted its last pre-*Brown* opportunity to correct the officially-imposed school segregation then extant. Instead, the

Board acted in a manner that literally cemented in the dual system and promised racially discriminatory public schooling for generations to come. What the Board did is referred to in the record as the West-Side Reorganization, and it involved a series of interlocking segregative maneuvers.

At this time, the Board was under pressure, as its record reflect, from "the resistance of some parents to sending their children to school in their district because it is an all negro [*sic*] school." A.499 (PX 75). In response, the Board constructed a new all-black school (Miami Chapel) located near the all-black Wogaman school and adjacent to the black De-Soto Bass public housing project; Miami Chapel opened in 1953 with an all-black student body and an 85% black faculty. A.316 (PX 4). The Board altered attendance boundaries so that some of the children in the four blacks-only schools were reassigned to the four surrounding schools with the next highest black pupil populations; and, through either attendance boundary alterations or the creation of optional zones, it reassigned white students from these mixed schools to the next ring of whiter schools. A.257-65, 283-84; PX 123.[12] And the Board began to assign black teach-

[12] The boundaries of the black Garfield and Wogamon schools were retracted, thereby assigning substantial numbers of black children to the immediately adjacent ring of "mixed" schools with the highest percentage of black pupils: Jackson (already 36% black in the 1951-52 school year), Weaver (68% black), Edison (43% black), and Irving (47% black). A.506 (PX 100E). Jackson and Edison were re-zoned to include more black students, and their outer boundaries were effectively contracted through the creation of "optional zones" so that white residential areas became attached, for all practical purposes, to the next adjacent ring of "whiter" schools. Thus, the Board brought blacks in one end and allowed whites to escape out the other in these "transi-

ers to these formally mixed schools, thereby confirming their identification as schools for blacks rather than whites. A.259-60; PX 3.

This latter aspect of state-imposed segregation—i.e., faculty assignments on a racial basis "pursuant to an explicit segregation policy of the Board" (A.56)—also underwent a slight change in school board policy. Prior to this time, as previously noted, the Board would not allow black teachers to teach white children under any circumstances; black teachers were assigned only to all-black schools, and white teachers were assigned only to white and "mixed" schools. Accordingly, in the 1951-52 school year, the Board substituted a new, but equally demeaning, faculty assignment policy (A.481 (PX 21)):

> The school administration will make every effort to introduce some white teachers in schools in negro [*sic*] areas that are now staffed by negroes [*sic*], but it will not attempt to force white teachers, against their will, into these positions.
>
> The administration will continue to introduce negro [*sic*] teachers, gradually, into schools having mixed or white populations when there is evidence that such communities are ready to accept negro [*sic*] teachers.

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tion" schools. The Board also created optional zones in white residential areas contained within the boundaries of the original four schools for blacks only, so that whites could continue to transfer out of these all-black schools. A.257-65. Prior to 1952 whites had been freely allowed to transfer to "whiter" schools, but such transfers were abolished in 1952. A.262, 482 (P X28). Optional zones were thus substituted for the prior segregatory transfer practice. (The optional-zone technique is discussed in greater detail at pages 24-30, *infra*.

This faculty policy, incredibly, was contained in a statement of the Superintendent disavowing the existence of segregated schools in the Dayton district.[13]

At the time of this Court's May 17, 1954 decision in *Brown* v. *Board of Education,* therefore, Dayton school officials were operating a racially dual system of public education. This segregation had not been imposed by state law; indeed, it was operated in open defiance of state law.

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[13] In 1954 the Superintendent made a further statement, which included the following: "All elementary schools have definite boundaries and children are obliged to attend the school which serves the area in which they reside. The policy of transfers from one school to another was abolished two years ago when the boundaries of several westside elementary schools were shrunken, permitting a larger number of Negro children to attend mixed schools." A.482 (PX 28). As we have seen (*see* note 12, *supra*), however, the elimination of free transfers was accompanied by a new device, optional zones, which served the same purpose of allowing whites to avoid attendance at black or substantially black schools.

The Superintendent's 1954 statement also contains the following (A.483):

> About two years ago we announced a policy of attempting to introduce white teachers in our schools having negro [sic] population. We have not been too successful in this regard and at the present time have only 8 full or part-time teachers in these situations. There is a reluctance on the part of white teachers to accept assignments in westside schools and up to the present time we have not attempted to use any pressure to force teachers to accept such assignments. The problem of introducing white teachers in negro [sic] schools is more difficult than the problem of introducing negro [sic] teachers into white situations. There are several all-white schools which in the near future will be ready to receive a negro [sic] teacher.

As we shall also show (*see* pages 20-24, *infra*), this race-based assignment of faculty continued for almost two more decades as a primary device for earmarking schools as intended for blacks or whites.

D. Continuation of the Dual System After *Brown*

Consideration of the Board's segregatory conduct following this Court's decision in *Brown* may be divided into six general areas: (1) faculty and staff assignments, (2) optional zones and attendance boundaries, (3) Board rescission of a Board-adopted plan of desegregation, (4) school construction, closing and site selection, (5) grade structure reorganization, and (6) pupil transfers and transportation. We summarize *seriatim* the facts relating to the first three areas. The facts pertaining to the latter three areas, and their legal significance, have been contested by the Board, and the court of appeals has reserved decision with respect to these practices. Since in our view disposition of this issue is not essential to affirmance of the judgment below, we have summarized the facts relating to these latter three areas in Appendix A, attached hereto.[14]

1. *Faculty and Staff Assignments*

The Board continued to make faculty and staff assignments in accordance with the racially discriminatory policy announced in 1951 (*see* page 18, *supra*)

[14] One of the three areas discussed in this part of the Statement—faculty and staff assignments—was discussed by the court of appeals in *Brinkman I* in part IV of its opinion, entitled "Other Alleged Constitutional Violations," on which the court reserved decision. A.56-67. But "Staff Assignment" (A.56-61) is included in that part of the opinion only because of plaintiffs' contention, implicitly rejected by the district court (*see* page 37, *infra*), that staff assignments at the time of trial continued to be made on a racially discriminatory basis. It is clear from the court of appeals' unqualified determination of the pre-1971 facts pertaining to staff assignments that the appellate court did not consider these practices to be the subject of dispute or of adverse district court findings. *See* note 47, *infra*.

at least through the 1970-71 school year. For example, in the 1968-69 school year, the Board assigned 633 (85%) of the black teachers in the Dayton system to schools 90% or more black in their pupil racial compositions, but only 172 (9%) of the white teachers to such schools. The Board assigned only 72 (9%) of the black teachers to schools which were 90% or more white, but 1,299 (70%) of the white teachers were assigned to such schools. A.320 (PX 5D).

Prior to the 1968-69 school year, the Board maintained teacher applications on a racially separate basis. Once teachers were hired, their records were kept on various racial bases which were used to segregate teachers and schools. Substitute teacher files were color-coded by race and substitutes assigned on a racially dual basis. And the Board restricted the hiring, transfer, and promotion of black teachers primarily to black or "changing" schools while white assignments or transfers to these schools were discouraged. A.191-95, 201, 204-05, 187-91; PX 3; R.I. 673-88, 536-542, 731-35, 742,50, 762-69. Principals, assistant principals, counselors, coaches and other clerical and classified personnel were assigned on an even more strictly segregated basis. A.486 (PX 42), 234, 191-93. Thus, from at least 1912 through 1968 the assignment of personnel in the Dayton school system fit perfectly the classical mold of state-imposed segregation: such assignments mirrored the racial composition of student bodies at new schools and additions,[15] and continued to correspond to the racial identity of

[15] The Board assigned faculty members to these new schools and additions so as to reflect the pupil racial composition at opening, thereby tailoring them as "black" or "white" in accordance with the Board's policy. A.316-17 (PX 4), 275; R.I.1860.

those schools already all-black or in transition.[16] White teachers similarly were assigned in disproportionate numbers to the predominantly white schools.[17] It was therefore possible at anytime during this period to identify a "black" school or a "white" school anywhere in the Dayton system without reference to the racial composition of pupils.

In November of 1968 the United States Department of Health, Education and Welfare [hereinafter, "HEW"] began an investigation of the Dayton public schools to determine whether official policies and prac-

[16] In the 1963-64 school year, for example, the Board assigned 40 of 43 new full-time black teachers to schools more than 80% black in their racial compositions. A.319 (PX 5A). Although somewhat less obvious, this practice was equally effective in identifying the formerly mixed schools as changing or black by assigning more than token black faculty only to these schools and thereafter assigning increasing numbers of black teachers only to these schools. PX 3; A.195-97, 224. As articulated by Mrs. Greer, a long-time black student, teacher and administrator in the system (*see* note 5, *supra*), the "assignment of staff to go along with the neighborhood change was the kind of thing that gave the impression of the schools being designed to be black, because black staff increased as black student bodies increased." A.191.

[17] Thus, for example, in the 1968-69 school year, the Board continued to assign new teachers and transfers according to the following segregation practice (A.319 (PX 5A)):

	Schools with predominantly white student enrollment	*Schools with predominantly black student enrollment*
Black Teachers	40	95
White Teachers	223	64

As the Superintendent testified, "it is obvious in terms of the new hires and transfers for that year the predominating pattern was the assignment of black teachers to black schools and white teachers to white schools." A.233.

tices with respect to race were in compliance with Title VI of the Civil Rights Act of 1964. By letter of March 17, 1969, the Acting Director for the Office of Civil Rights of HEW notified the Dayton Superintendent (and the chief state school officer) that "[a]n analysis of the data obtained during the [compliance] review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff." A.415 (PX 11A). Following this determination the Dayton Board agreed with HEW to desegregate all staff so "that each school staff throughout the district will have a racial composition that reflects the total staff of the district as a whole" (A.416 (PX 11F)), in accordance with the principles set forth in this Court's decision in *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). At that time, the Dayton professional staff was approximately 70% white and 30% black; the Board-HEW agreement required complete staff desegregation by September 1971. A.417. Nevertheless, by the time of trial in November 1972, it was still possible to identify many schools as "black schools" or "white schools" solely by the racial pattern of staff assignments.[18]

No non-racial explanation for the Board's long history of assigning faculty and staff on a racial basis is possible.[19] Nor can the impact of this manifestation of

[18] The manner in which the Board's assignment of its professional staff at the high school level, for example, still served to racially identify schools, athough considerably less dramatically than prior to the 1971-72 school year, is demonstrated by a table set out by the court of appeals in *Brinkman I*. A.57. Moreover, classified personnel (e.g., secretaries, clerks, custodians and cafeteria workers) continued to be assigned on a racially segregated basis. A.234.

[19] School officials, of course, had absolute control over the place-

state-imposed segregation on student assignment patterns by minimized. While that effect is not precisely measurable, it is so profound that it could not have been eliminated merely by desegregating faculties and staffs.[20]

2. *Optional Zones and Attendance Boundaries*

We have already shown how the Dayton Board utilized optional zones and attendance boundary manipulation as segregative devices in connection with the 1952 West-Side Reorganization (*see* pages 16-18, *supra*). There are additional examples of both practices which stand on their own as segregation techniques.

Optional zones are dual or overlapping zones which allow a child, in theory, a choice of attendance between two or more schools. A.241. Yet, the criteria stated by the Board for the creation of both attendance boundaries and optional zones are precisely the same: they constitute merely a type of boundary decision and

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ment of their employees. Consequently, the Board's historic race-oriented assignments of faculty members intentionally earmarked schools as "black" or "white." A.274.

[20] Dr. Robert L. Green, Dean of the Urban College and Professor of Educational Psychology at Michigan State University, described how such faculty-assignment practice "facilitates the pattern of segregation" (A.197) in these terms (A.195):

> When there has been historical practice of placing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentially uni-racial or predominantly black or predominantly white.

See also A.274-75.

serve no other educational or administrative purpose. A.238, 279. Optional zones have existed throughout the Dayton school district and have apparently been created whenever the Board is under community pressure which favors attendance at a particular school or disfavors attendance at a particular school. A.254; R.I. 1818-19. Other than for such purely "political" reasons, there is no rationale which supports the establishment of an optional zone rather than the creation of an attendance boundary, which is a more predictable pupil-assignment device (A.280); and optional zones are at odds with the so-called "neighborhood school concept." A.12-13.

In many instances in Dayton optional zones were created for clear racial reasons, as, for example, in the West-Side Reorganization, while in other instances the record reveals no known reason for their existence. But even in these latter instances some optional zones have had clear segregative effects. From 1950 to the time of trial, optional zones existed, at one time or another, between pairs of schools of substantially disproportionate racial compositions in some fifteen instances directly effecting segregation at some 30 schools.[21] In addition, at the high school level, Dunbar remained in effect a city-wide optional zone for blacks

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[23] The West Side Reorganization in 1952-53 (*see* pages 16-18, *supra*) involved six optional areas with racial implications: Willard-Irving, Jackson-Westwood, Willard-Whittier, Miami Chapel-Whittier, Wogamon-Highview, and Edison-Jefferson. A.252-53, 257-65; *see also* note 12, *supra*. Other optional zones with demonstrable racial significance at some time during their existence include the following: Three optional zones between Roosevelt and the combination Fairview-White; two optional zones between Residence Park and Adams; and optional zones between Westwood and Gardendale, Colonel White and Kiser, Fairview and Roth, Irving and Emerson, Jefferson and Brown, and Jefferson and Cornell Heights. A.250, 253-54, 255, 268-69, 279-83; PX 47-51.

only through 1962 when it was converted into an all-black elementary school (A.248, 269-71) (*see* note 10, *supra*); and Patterson Co-Op remained a city-wide and, through the 1967 school year, virtually all-white optional attendance zone.[22] In conjunction with the attendance-area high schools, these two special high schools operated as city-wide dual overlapping zones contributing to the pattern of racially dual schools at the high school level throughout the district. *See* R.I. 1518-21, 1483-84.

Actual statistics on the choices made by parents and children in four optional areas are available. In each instance the option operated in the past, and in three instances at the time of trial, to allow whites to transfer to a "whiter" school. For example, in the Roosevelt-Colonel White optional area, which was carved out of Roosevelt originally, from the 1959-60 school year through the 1963-64 school year a cumulative total of 1,134 white but only 21 black students attended Colonel White. A.464 (PX 15A1). Testimony from a Dayton school administrator indicates that from 1957 through 1961, although this optional area was predominantly white, black students who lived in the area attended Roosevelt which had become virtually all-black (Colonel White was 1% black). A.221-22.

[22] The city-wide Patterson Co-op operated in a more subtle segregative fashion than did Dunbar. In 1951-52, Patterson had no black students and no black teachers (A.507 (PX 130B)); by 1963 its student body and faculty were only 2% black (A.508 (PX 130C)); and by 1968 the pupil population rose to 18.3% black and the faculty to 3.5% black. A.509 (PX 130D). Students were admitted to Patterson through a special process involving coordinators and counselors, none of whom were black prior to 1968. A.286-88. Patterson has over the years served as an escape school for white students residing in black or "changing" attendance zones, particularly Roth and Roosevelt. R.I. 1483-84.

The Roosevelt yearbook for 1962 shows that only three white seniors from the optional area attended the black high school. A.462 (PX 15A). As Mrs. Greer testified, this optional area did "an excellent job of siphoning off white students that were at Roosevelt." A.190.[23]

Although many of these still-existing optional zones had already fulfilled their segregative purpose by the time of trial, over time they clearly contributed substantially to and facilitated school segregation. Moreover, even by the time of trial several of these optional areas continued to permit whites to escape to "whiter" schools, thereby further impacting the black schools and precipitating additional instability and transition in residential areas.[24]

[23] As another example, the Colonel White-Kiser option acquired its racial implications after its creation in 1962 with the racial transition of the Colonel White school, to which the Colonel White-Roosevelt option contributed in no small measure. At its inception and for several years thereafter, when both schools were virtually all-white, most children in the White-Kiser option area chose White. As Colonel White began to acquire more black students, whites chose Kiser more often until in the 1971-72 school year, no white children chose the 46% black Colonel White school, while 20 chose the 6% black Kiser school. A.465 (PX 15B1), 554.

The rebuttal figures provided by the defendants on the Residence Park-Jackson optional area are equally instructive, because the figures relate to a time when the optional area did not even exist by reason of the construction of the virtually all-black Carlson school and its assumption of the old Veterans Administration optional area as its regular attendance zone. A.586, 587. In any event, defendants' exhibit shows that from 1957 through 1963 no children from the former V.A. optional area attended Jackson, while 32 whites (and 8 blacks) attended Residence Park. In the 1957-58 school year, Residence Park was basically white and Jackson was black. A.250-51; R.I. 377. (By 1961, however, Residence Park had become 80% black. A.508 (PX 130C).)

[24] From 1968 through 1971, when Roosevelt was a 100% black

Formal attendance boundaries, in conjunction with optional zones, have also operated in a segregative fashion; and in some instances firm boundaries were also drawn along racial lines.[25] An example is the boundary separating Roth and Roosevelt which was drawn in 1959. Roth took almost all the white residential areas on the far west side of Dayton from Roosevelt. At its opening, Roth had only 662 pupils, while Roosevelt's enrollment dropped by 602. Coupled with the exodus of whites out of Roosevelt through the Colonel White-Roosevelt optional area, almost all whites were thereby transferred out of Roosevelt by

school, for example, 375 white children from Roosevelt-Colonel White optional area attended Colonel White. A.464. Throughout its life, then, this option has allowed very substantial numbers of white children to avoid attending Roosevelt. By 1968, however, and not atypically, the optional area had undergone significant racial change and substantial numbers of black children were also attending Colonel White. A.462-64. Plaintiffs' expert, Dr. Foster, explained how optional attendance areas facilitate both educational and racial segregation:

> [T]he short term effect . . . is to allow whites to move out of a school assignment that is becoming black . . . [A.255].
>
> [G]enerally where you have an optional zone which has racial implications, you have an unstable situation that everyone realizes is in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation . . . [T]hese [optional areas in Dayton] accelerated and precipitated further segregation . . . [A.254-55].

[25] In some instances, and in addition to the official optional zones, attendance boundaries have not been enforced for white children when assigned to black schools. For example, a pupil locator map made to assist in developing a middle school plan in the 1970-71 school year showed that many white children assigned by their attendance zone to the predominantly black Greene school were actually attending predominantly white schools located on the other side of Wolf Creek. R.I.1210-11. A similar situation existed in the Carlson area. *See* note 23, *supra*.

Board action, in short order converting Roosevelt into a virtually all-black school. A.268-69; PX 48 & 46. (And, of course, the designation of Roosevelt as a black school was evidenced, in the traditional way, by assigning ever-increasing numbers of black teachers to the school. PX 3.)

At about this same time, Meadowdale high school also opened, but as a virtually all-white school. A.317 (PX 4). Opportunities were available for the placement of such high schools and use of the excess capacity or the redrawing of the boundaries of Roth, Roosevelt, Stivers, Fairview and Meadowdale in order to accomplish desegregation. But school authorities selected the alternatives that continued rather than alleviated the extreme racial segregation at the high school level. R.I. 1696-1700; PX 6; A.249, 268-69. This pattern was capped in 1962 when a new Dunbar high school opened with a virtually all-black faculty and a defined attendance zone that produced a virtually all-black student body. At the same time the Board converted the old Dunbar high school building into an elementary school (renamed McFarlane), whose newly-created attendance zone took in most of the students in the zones for the all-black Williard and Garfield schools, which were closed. *See* note 10, *supra*.

Finally, the Board also persistently refused to redraw boundaries between, or pair, contiguous sets of schools which had been, and were at the time of trial, substantially disproportionate in their racial compositions. Examples of such contiguous pairs include Drexel (8% black) and Jane Adams (79% black); McGuffey (42% black) and Webster (1% black) or Allen (1 %black); Irving (99% black) and Emerson (9% black); Whittier (99% black) and Patterson

(0% black). PX 68, 62. Such alternatives to segregation—many of which were recommended by subordinate school administrators and even the Ohio State Department of Education (A.204-05, 419-55 (PX 12)) —were rejected by the Board.

3. *The Board's Recission of Its Affirmative Duty*

As reflected in the foregoing pages, black citizens of Dayton have been thwarted in their attempts to end state-imposed racial segregation in their public schools. Even aggressive action, such as that taken by Robert Reese's father when he went to court in 1926 to challenge intentional efforts to segregate his children, was effectively blunted by Dayton school authorities committed to separation of the races. *See* pages 9-12, *supra*. During another critical period, 1951-52, the Board imposed the West-Side reorganization and a new racially discriminatory faculty-assignment policy. *See* pages 16-19, *supra*. The black community's repeated protests following *Brown* to the continued segregation also were turned aside. *See* A.358-59, 456-57, 459-61. By the late 1960's, however, those who objected to state-imposed school segregation began to gain allies, both in the white community in Dayton and among state and federal agencies. As previously noted (*see* pages 22-23, *supra*), HEW conducted a Title VI compliance review in 1968 and forced the Board in 1969 to agree to end its racially dual faculty-assignment practices. HEW had also noted the "substantial duality in terms of race or color with respect to distribution of pupils in the various schools . . ." (A.415), but the agency did not pursue this concern with similarly aggressive action.[26]

[26] As is commonly known, from the frequent judicial declarations on the subject, HEW has generally failed to fulfill its Title VI obligations with respect to pupil desegregation in both the North and the South. *See, e.g., Adams* v. *Richardson*, 480 F.2d 1159 (D.C.Cir. 1973) (*en banc*); *Brown* v. *Weinberger*, 417 F. Supp. 1215 (D.D.C. 1976). And it has not been notably aggressive even with respect to faculty segregation. *See Kelsey* v. *Weinberger*, 498 F.2d 701 (D.C.Cir. 1974).

Also during these years, the Dayton Board, in the 1971 words of the State Department of Education, "passed various and sundry resolutions . . . designed to equalize and to extend educational opportunities, to reduce racial isolation, and to establish quality integrated education in the schools." A.423. But these were just words and informal ones at that. As the State Assistant Superintendent for Urban Education noted at the same time, there was a definite need for action and not just words. A.422.

On April 29, 1971, the Board requested assistance from the State Department of Education's Office of Equal Educational Opportunities to provide technical assistance in the development of alternative desegregation plans. The Board also authorized its President to appoint a committee of community representatives to assist and advise the Board in connection with such proposed plans. A.354-55.

The State Department of Education responded by assembling a team of consultants and specialists to evaluate data and make recommendations. Their recommendations were submitted to the Dayton Superintendent on June 7, 1971. A.419-55. The State Department advised the Dayton Board of its constitutional and other legal obligations (A.435) (emphasis in original):

> Since the Board, *as an agency of state government,* has created the inequality which offends

> the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative duty to comply with the Constitution; that is, as the Supreme Court has stated, "to eliminate from the public schools all vestiges of state-imposed segregation."

The State Department then turned its attention to a list of alternatives, and urged the Dayton Board to shoulder its constitutional obligations *now* (A.441) (emphasis in original):

> *Delaying tactics could be continued.* The Board, in spite of resolutions and overt commitment, could choose to make only the slightest mandated changes, and to utilize the best legal talent available to resist compliance with constitutional requirements. Other school districts have chosen this alternative, even as Dayton has used similar methods in the past. However, the highest court in the land has stated the constitutional offensiveness of state-imposed segregation of school-children, and persisting delay clearly violates the oath of office of members of the Board of Education in the state of Ohio.

The State Department concluded by recommending "a comprehensive plan" that would be a "constitutionally valid and inoffensive, educationally sound, and morally proper" approach for "the Dayton Board of Education, acting as an agency of Ohio State Government . . ." to take. A.444.[27]

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[27] Under the terms of Opinion No. 6810, issued by the Ohio Attorney General on July 9, 1956, the State Department of Education has the primary affirmative duty to see that local school districts comply with their Fourteenth Amendment obligations with respect to public schooling. A.597-606.

The Board-appointed advisory committee of community representatives became known as the "Committee of 75." In his charge to the Committee, the Dayton Board President stated: "We have admitted that the district is guilty of procedures which have led to the racial isolation of school children." A.356. The Committee issued its report in the fall of 1971. The Report of the Committee of 75 (A.345-69) also urged the Board to adopt a comprehensive plan and joined the State Department in emphasizing "that time for a change in Dayton has run out! We must act now." A.369.

On December 8, 1971 the Dayton Board of Education, for the first time ever, responded with meaningful action. It first "recognize[d] and admit[ted] that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor Boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs . . . ." A.321. The Board then adopted a program of actual system-wide desegregation and directed the Superintendent to implement such a new pupil-assignment policy for the 1972-73 school year. The new policy consisted of two principal parts: first, the existing attendance zones and the Freedom of Enrollment policy[28] were abrogated effec-

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[28] The Board's Freedom of Enrollment policy was adopted in 1969. A.466-67. It had a very negligible, one-day desegregative effect (i.e., a few black students transferring to white schools), but white students did not transfer to black schools. A.478 (PX 16D). As the Superintendent testified, "the pattern . . . has been perva-

tive September 1, 1972; second, in their stead, a new pupil-assignment policy was adopted, the goal of which was that no school would have a racial composition "substantially disproportionate to the district as a whole." A.329. Pursuant to the Board's directions, the Superintendent of Schools adopted a plan for Fall 1972 implementation prepared by Dr. Gordon Foster and others of the Title IV Florida School Desegregation Consulting Center of the University of Miami. A.370-414.

On January 3, 1972, however, a newly-constituted Dayton Board[29] rescinded the prior Board's action of December 8, 1971, refused to consider the plan adopted by the Superintendent, reinstated the Freedom of Enrollment policy and reimposed the segregated attendance zones. A.331-53.[30] Plaintiffs instituted this action on April 17, 1972, and the case went to trial in November 1972.

At that time, the Dayton school district was segregated by race, as it always had been. In the 1971-72 school year (when the complaint was filed), there were

sive down through the years, that no white students, regardless of from where they came, or the purpose,, were assigned to black schools." A.232.

[29] Three new members of the seven-member Board had been elected the previous November to take office in January.

[30] By its actions, the new Board made it clear to the Superintendent that he would not be permitted to exercise his independent authority over the assignment of pupils (*see* OHIO REV. CODE § 3319.01) to implement the desegregation plan. R.I. 1096. The statute just cited vests the local Superintendent of Schools with the responsibility to "assign the pupils of the schools under his supervision to the proper schools and grades," except with respect to the assignment of pupils to schools outside their school districts of residence, where board approval is necessary.

69 schools in the Dayton district; 49 of them had student enrollments 90% or more one race (21 black, 28 white). Of the 54,000 pupils enrolled, 42.7% were black; 75.9% of all black students were assigned to the 21 black schools. A.314 (PX2D).[31] Thus, although the system was larger, it was basically the same dual system that existed at the time of *Brown* (*see* page 15-16, *supra*).[32]

Every school which was 90% or more black in 1951-52 *or* 1963-64 *or* 1971-72, and which was still in use at the time of trial (1972-74 school year) remained 90% or more black. Of the 25 white schools in 1972-73 (*see* note 31, *supra*), all opened 90% or more white and, if open, were 90% or more white in 1971-72, 1963-64, and 1951-52. A.315 (PX 2E). *See also Brinkman I*, A.50-51.

E. The District Court's Decision and Supplemental Order on Remedy

On February 7, 1973, the district court entered its Findings of Fact and Memorandum Opinion of Law. A.1-14. The district court dealt with the parties' contentions and the evidence in a cursory fashion. It made

[31] In 1972-73 there were 68 schools, of which 47 were virtually one-race (22 black, 25 white). Fully 80% of all classrooms were virtually one-race. (Of the 50,000 pupils in the district that year, 44.6% were black). A.311 (PX 2A).

[32] It was also the same one that existed in the 1963-64 school year (the first year after *Brown* for which racial data is available). In that year there were 64 schools in the Dayton system, of which 57 had student enrollments 90% or more one race (13 black, 44 white). Of the 57,400 pupils in the district that year, 27.8% were black. Yet 79.2% of all the black pupils were enrolled in the 13 black schools; and 88.8% of all pupils were enrolled in the 13 black schools; and 88.8% of all pupils were enrolled in such one-race schools. A.313 (PX 2C).

few specific findings of subsidiary fact, devoting most of its attention to surprisingly general and imprecise ultimate findings and conclusions. And it never shifted the burden of proof from plaintiffs despite the prior history of segregation.

With respect to the extensive and largely uncontroverted proof of pre-*Brown* racial discrimination, the court noted the "isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system." A.2. The court concluded (A.3):

> While arguably consistent with the social mores of the times, the treatment of black children during this period was at least inhumane and by present standards, reprehensible. . . . Both by reason of the substantial time that has elapsed and because these practices have ceased, however, the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy.

With respect to the Dunbar high school, the court found that it "was intended to be, and did in fact become, a black high school, with an all black teacher and pupil population . . . . [that] continued to exist as a city-wide all-black high school until it closed in 1962." A.4-5. Except to note the black Garfield annex in the 1920's the court made no findings with respect to the other black schools or the Board practices with respect to public housing projects. The court also ignored the West-Side Reorganization (except to note that the Westwood-Jackson optional zone had "racial significance at the time of its creation." A.8). No findings were made concerning the 1962 conversion of Dunbar into the all-black McFarlane elementary serving the former all-black Willard and Garfield attend-

ance areas and the opening of a new Dunbar high school with a virtually all-black faculty and student body.

With respect to faculty and staff, the court found that the Board's intentionally segregative assignment policies and practices could not "be dismissed on a *deminimus* theory." A.3. The court found, however, that "[b]y 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member," and that faculty were thereafter "substantially integrated" pursuant to the Board's agreement with HEW. A.4. The district court further found that the Board's employment of blacks in certain "positions such as skilled craftsmen . . . remains substantially below the percentage of black students population or the percentage of black teachers and administrators." A.4.

As to the pattern of one-race schooling at the time of trial, the court found that the "great majority of all schools" in Dayton are "racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census." A.5.[33] With the exception of recent affirmative efforts

[33] The court apparently uses the terms "racial imbalance" and "racial balance" to mean, respectively, segregated and not segregated. In the "racial imbalance" part of its opinion, the court directs the reader's attention to attached Appendix A, which lists each Dayton school and its 1971-72 racial composition. The court summarizes the elementary school situation in these words: "Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.2% black." A.15. It seems fairly clear that the judge is referring to the 90%-plus one-race schools when he says that the "great majority . . . are racially imbalanced." A.5. And it is completely clear that the court does not equate "racial balance" with the system-wide black/white ratio, for no school

to desegregate Patterson Co-Op high school, "no effort has been made by the school board of Dayton to balance by race the student population at any particular school." A.5.

The court generally found the Board's practices concerning school construction and site selection, attendance boundaries and grade structure reorganization, and transfers to be "rational . . . and within the sound discretion of the Board" (A.5.), "neither segregative nor integrative" (A.6), "neutral" (A.7), or not "unfairly operated." A.9. Conceding that the Board could have exercised its discretion differently to choose among available alternatives which might have integrated the schools (A.7), the court nonetheless found that "plaintiffs have failed in their burden of showing that the defendant board exercised these options in an improper fashion." A.7. The court also found: (1) unspecified "errors in board planning" apparently intensifying school segregation (A.7); (2) a pattern of construction of new elementary schools and additions in "white neighborhoods" and "black neighborhoods" which opened and remain "predominantly" one-race (*id*); (3) the construction and location of new high schools "which followed the pattern of construction of elementary schools in that sites were selected away from the center of the city" in one-race areas (A.7); (4) a January 4, 1971 reorganization of middle schools having "neither segregative nor integrative effect" (A.6); and (5) a "free transfer" program which failed even to "reduce somewhat

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has a pupil population correlating with that figure (which is about 43% black for the 1971-72 year). If "racial balance" meant that, the court would have said *every* school (rather than just the "great majority") is "racially imbalanced."

racial imbalance and remove community perception of 'black' and 'white' schools." A.9. (*See* Appendix A, attached here, for a summary of the evidence with respect to these practices.)

With respect to optional zones, the court discussed the record with similar imprecision, but found, on balance, that plaintiffs had met the burden of proof imposed by the court. The court found that "many [optional zones] were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations." A.8. "[R]acial significance" was attached to the creation of Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth. *Id.* Without otherwise making findings as to the role of optional zones over time, the court found 11 current zones (7 at the elementary and 4 at the high school level). Although the elementary optional zones do not "today have any significant potential effects in terms of increased racial separation, the same cannot be said of the high school optional zones." *Id.*

With respect to the 1972 Board's rescission of the 1971 Board's desegregation program, the court rejected a "parliamentary rules" argument by the Board and concluded that the 1972 Board's action "was not in the nature of a reconsideration but instead was a rescission of the previous action." A.11. As such, it "constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton." *Id.*

Turning to the developing law applicable to challenges to non-statutory racial segregation, the court conceded its confusion and spoke of this case as "a

square peg for the round holes" of southern cases and "a round peg for the square holes of" northern cases. A.11-12. The court concluded (A.12):

> What we have found are racially imbalanced schools, optional attendance zones, and recent Board action, which are cumulatively in violation of the Equal Protection Clause. We hold that the totality of these findings require intervention by this Court under the mandate of *Brown* v. *Board of Education* . . . .

The court further noted that optional attendance zones are totally inconsistent with "the neighborhood school concept." A.12-13.

"Without seeking to calibrate the degree of segregation that inheres in individual policies of the Board," the court directed the Board to submit a plan which would (1) abolish all presently remaining optional attendance zones, (2) restate the Freedom of Enrollment policy so that "no student of a minority race may be denied attendance at any high school in the Dayton Public School System and so that transfers for purpose of improving racial balance take precedence over curriculum transfers," (3) "[m]aintain faculty assignment policies that will reflect in each school the approximate ratio of black to white faculty throughout the district," and (4) "[e]stablish hiring policies that will enable the clerical and maintenance personnel hired by the school board of Dayton to approximate the proportion of black-to-white ratio of the Dayton School District." A.13 These four specific criteria were deemed "minimum" aspects of the plan which, in addition, "shall in all other respects conform to the requirements of law. *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971); *Davis* v. *Board of School Commissioners of Mobile County, Ala.,* 402 U.S. 33 (1971)." A.13-14.

On March 29, 1973 the Dayton Board submitted a purported "plan" to the district court which responded to the four specifics of the district court's order but went no further in the way of pupil desegregation.[34] In essence the plan submitted by the Board merely expanded the "free choice" options which the district court had previously found (A.9-10) to be of negligible impact on the segregated pattern of pupil assignments. The Board refused to submit to the court an alternative plan of actual desegregation supported by the Superintendent and three of the seven Board members. (A plan was also proposed by the Dayton Classroom Teachers Association.) Plaintiffs filed objections to the plan submitted by the Board majority, and requested adoption of the more effective plan prepared by the Superintendent and the Board minority.

On July 13, 1973, the district court, without a hearing, entered an order approving, with one modificaiton, the relevant portions of the plan submitted by the Board majority, although the court expressed its "disappointment at the limited nature" of the remaining aspects of the plan. A.27.[35] Because this Court's

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[34] The plan submitted by the Board majority contained discussion of seven points in addition to the four particular requirements of the district court's opinion. These points related to "cultural exchanges," "control and learning centers," "musical stereopticons," and the like, all having nothing to do with actual school desegregation but requiring considerable busing and expense. A. 131-144.

[35] The district court modified the Board's Freedom of Enrollment proposal with respect to high school students. The court-ordered modification did not impose "majority to minority" transfers, which limit transfers to those that have desegregative impact.

decision in *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973), had intervened between the district court's February decision on violation and its July remedial order, the court apparently felt constrained to make some additional points about the scope of the Board's constitutional obligation. Relying on the *dissenting* part of Mr. Justice Powell's separate opinion in *Keyes,* the district judge listed a number of non-segregative aspects of the Board's *current* operation.[36] The court concluded (A.30):

> However, there has been evidence which indicates that the affirmative promotion of integration through these essential functions of the Board has not held an important place in the Board's priorities.
>
> The Powell rationale will operate prospectively. The Board's planning and implementation units must become capable of and sensitive to the racial effects which flow from the drawing of attendance lines, the construction and improvement of school facilities and the assignment of faculty, staff and pupils. All of such actions must henceforth be examined for their "integration impact."

Rather, the court modification provided "free choice" to all high school students of any high school, subject to priorities for those presently enrolled in a school and to space limitations. A.27-28.

[36] The court found, *inter alia*, that "[t]here is presently no evidence of a failure of equality of facilities, instructions and curricula opportunities nor has there been a persuasive proof that the Board, in recent times, drew attendance lines or built new facilities for the avowed purpose of minimizing integration." A.30. This holding was surprising, as the district court had refused to allow any party to introduce proof concerning inequalities in these particulars. R.I. 419-25, 1970, 1903. (HEW, in its 1969 Title VI noncompliance letter to the Dayton Board, found "that students at Roosevelt High School are not afforded the same educational opportunity as other students in [the] system." A.416.)

The court ordered "a retention of jurisdiction while a reasonable period of time is given to the School Board for this purpose." A.31. The court, however, did not consider or apply the standards established by the Court in *Keyes* to determine the scope of the Board's constitutional obligation or in evaluating the evidence of violation or the adequacy of proposed plans.

Plaintiffs' appealed and the Board cross-appealed to the United States Court of Appeals for the Sixth Circuit.

F. *Brinkman I*

On August 20, 1974 the Court of Appeals for the Sixth Circuit filed its opinion on plaintiffs' appeal and the Board's cross-appeal. A.32-69. Upon a careful review of the portions of the record placed in dispute, the court of appeals affirmed the district court's conclusion that there had been a cumulative violation of the Equal Protection Clause, based on the long history of unabated one-race schooling, the extensive use of optional zones to promote segregation, and the purposeful rescission of a system-wide program of desegregation. Moreover, because the Board did not contest the pre-*Brown* violation, the court found it unnecessary to review the evidence and district court findings in this regard. A.56.

The court also found it unnecessary to decide whether the 1972 Board's rescission of the 1971 Board's desegregation plan was an independent violation of plaintiffs' constitutional rights. Decision on this issue was unnecessary in the court's view because of its conclusion that at the relevant time the Board was under an affirmative constitutional duty to desegregate; consequently, a rescission of affirmative

action taken in accordance with that constitutional obligation served to compound the initial constitutional violation. A.55-56. The court of appeals also concluded that prior to *Brown* the Dayton Board's faculty-assignment practices were carried out pursuant to "an explicit segregation policy of the Board," and that the Board "effectively continued in practice the racial assignment of faculty through the 1970-71 school year." A.50; *see also* note 14, *supra*. With respect to site selection and school construction, grade structure reorganization, pupil transfers and transportation, and current faculty practices, the court of appeals detailed some of the considerable evidence supporting plaintiffs' claim that the Board's practices in these areas also constituted independent constitutional violations. A.61-66. The appellate court, however, reserved decision on the "serious question with respect to whether the District Judge's failure to include these . . . practices within the cumulative violation" (A.66-67) was supportable because of its view that the Board otherwise was under an affirmative obligation to desegregate. A.67.

The court found the "free choice" remedy ordered by the district court ineffective and, therefore, constitutionally inadequate "considering the scope of the cumulative violations"; the case was accordingly remanded with directions that a plan of desegregation be developed consistent with the remedial guidelines of *Keyes* and *Swann*. A.67-68. Quoting from *Keyes*, 413 U.S. at 200, the court concluded (A.68):

> Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty

> . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" . . . When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate.

Finally, the court rejected all other "contentions of the parties contrary to the conclusions reached in [its] opinion . . ." A.69.

G. Remedial Proceedings.

Following the Sixth Circuit's remand in *Brinkman I*, the district court entered an order on January 7, 1975 directing the Dayton Board and any other interested parties to submit proposed plans of desegregation. A.70-72. The Board submitted a proposed plan (A.144-54), and plaintiffs also submitted a plan prepared by Dr. Gordon Foster, who had earlier prepared a plan of desegregation for the Board pursuant to its desegregation resolutions adopted in December 1971. *See* page 34, *supra*. The plan submitted by the Board was essentially a modification of the prior plan which had been found inadequate by the court of appeals in *Brinkman I*. Basically, it was a modified "freedom of choice" plan calling for the establishment in some schools of programs not offered in others. These special-program schools would be called "magnet schools" and "learning centers." The programs offered were to be designed to attract a limited bi-racial enrollment on a voluntary and, in the main, part-time basis. *See* A.144-54. At best, the Board's "curriculum plan" would have entailed actual full-time desegregation for only about 3,000 students, and another 3,400 students were to be affected only on a part-time basis. A.296-98.

Plaintiffs plan, in contrast, was a plan of actual system-wide desegregation. *See* A.298-99.

On March 10, 1975, following a hearing on the plans held February 17, 19, and 20, 1975, the district court entered its order (A.73-84). The court found that "[p]laintiffs' plan is a comprehensive one; it was carefully prepared and well-presented." A.78. But the court rejected plaintiffs' plan (A.79), and adopted instead, on a provisional basis, the plan submitted by defendants. A.79-81. The court reasoned that two intervening events "may well have changed both 'the nature of the violation' and the 'scope of the remedy.'" A.76. The first of these "events" was the decision in *Higgins* v. *Board of Education of the City of Grand Rapids,* 508 F.2d 779 (6th Cir. 1974), a case in which the Sixth Circuit had affirmed a district court judgment that pupils had not been unconstitutionally segregated on the basis of race. The second "event" was the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* The court determined that this Act required rejection of plaintiffs' plan. A.79. Accordingly, the court adopted the Board's plan on a provisional basis, although it recognized the very limited nature of the Board's proposals, as well as its failure to consider more promising alternative methods of accomplishing desegregation. The Board was directed to study the feasibility of adopting more significant measures for the following school year. A.81. The court certified its order for appeal pursuant to the provisions of 28 U.S.C. § 1292(b), because of its belief that its holdings with respect to the Equal Educational Opportunities Act "involve a controlling question of law as to which there is substantial grounds for a difference of opinion. . . ." A.84.

Plaintiffs immediately appealed, moving for summary reversal and requesting specific remedial directives from the court of appeals. On June 24, 1975, the court of appeals issued its opinion in *Brinkman II.* A.89-96. The court reiterated its previous opinion in *Brinkman I* to the effect that the Board was guilty of "[s]egregative acts and practices . . . both before and after the decision of the Supreme Court in *Brown* . . . [which] have continued down to the present time." A.89-90. The court added: "Although the phrase 'de jure' does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices." A.90. Upon analysis of the Board's plan as approved by the district court, the court of appeals determined that the plan did not conform to the mandate in *Brinkman I.* A.91. The court recognized that the Board's plan "contains some significant curricular innovations and that it would be a step toward integration of the Dayton school system," but that it "does not even purport to dismantle Dayton's one-race schools other than Miami Chapel and Roosevelt High School, and even if the magnet plans are successful, the vast majority of one-race schools will remain identifiable as such." A.93. The court of appeals rejected the district court's view that the two intervening "events"—the Sixth Circuit's decison in *Higgins* and the Equal Educational Opportunities Act—supported the limited remedy ordered. The court construed the Act, in accordance with the terms of 20 U.S.C. § 1702 (b), "as not limiting either the nature or the scope of the remedy for constitutional violations in the instant case." A.95. With respect to the second "event," the court said: "There could be no possible merit in the contention that the opinion of this court in *Higgins,*

relating to the school system of Grand Rapids, Michigan, altered in any way the nature of the cumulative violations described in our former opinion in the present case or the scope of the constitutional remedy required by this court on the remand which we directed in that opinion." A.95. Indicating that it would be inclined to grant plaintiffs' motion for summary reversal but for the difficulties of developing a "comprehensive plan" for the 1975-76 school year scheduled to begin in September, the court remanded the case to the district court with directions (1) to desegregate as many one-race schools as possible by September, 1975, (2) to enjoin the Board from reassigning the Miami Chapel black students to other all-black schools, and (3) to "adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*." A.96. The court of appeals directed that its mandate issue forthwith, and the Board's application for a writ of certiorari was subsequently denied by this Court. 423 U.S. 1000 (1975).

Upon the remand in *Brinkman II*, the district court appointed an expert, Dr. Charles Glatt, to examine the system and make desegregation recommendations. Dr. Glatt was murdered in the midst of his work. Thereafter, both plaintiffs and the Board presented plans to the district court, pursuant to its order of November 5, 1975. The Board's plan had been prepared by a team of experts appointed by the Board. The Board had voted to submit the plan to the court, but, by vote of 4-3, the Board had refused to approve the plan. A.305. The plan prepared by the Board's experts utilized diverse choice, zoning and curriculum differentia-

tion mechanisms for desegregation, but the plan did not specify actual pupil assignments, and no provision for transportation was included. R. III. 38-40, 52, 67-69, 101, 136-37, 149-51, 206-20, 252-53. Both plaintiffs' experts and the Board's experts were in agreement, however, that approximately 15,000 pupils would have to be transported under either the Board's plan or plaintiffs' plan, and that, because of Dayton's compact nature and the efficiency of its thoroughfares, complete, effective desegregation could be accomplished without presenting any threat to the health, safety or education of schoolchildren due to factors of time, distance and amount of transportation. A.304; R.III. 224; "A Desegregation Plan for the Dayton, Ohio Public Schools," at 127, 138 (Dec. 2, 1975) [the Board's plan].

Following a December 8, 1975 hearing, the district court entered an order on December 29, 1975 on the plans submitted. A.99-106. After summarizing the nature of the plans, the limited nature of federal judicial intervention, and the Board's broad discretion in matters of administrative and education policy (A.100-02), the court made the following statement (A.102):

> In contrast to the foregoing, it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.
>
> The only feasible method of sharing requires a balancing in each school between black and white students in a ratio approximating the system-wide balance. Insofar as either plan will result in an acceptable redistribution, such plan meets the constitutional limitations set forth in both the *Swann* and *Keyes* cases.

> The defendants may adopt their own plan, may adopt the plaintiffs' plan, may combine the two, or any parts thereof, provided that each school in the school district as of September 1, 1976, is desegregated as defined herein.

Observing that the system was 48% black and 52% white, the court stated that any school would be deemed desegregated if it "reflect[ed] this district ratio plus or minus 15%." A.103. The court ordered the Board to implement a plan seeking to achieve for each school a "pupil population approaching the district percentage, but deviating no more than 15%, plus or minus." *Id.* The court set forth two exceptions to this requirement. First, it allowed all students already enrolled in high schools to remain at their present school through graduation because of the importance the court attached to high school "loyalty." *Id.* Second, citing *Swann,* 402 U.S. at 24, the court held that "where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school by-school basis." A.104. The court then appointed Dr. John A. Finger (who had been the district court's expert in *Swann*) to act as Master pursuant to Rule 53, FED. R. CIV. P., to work out the details of a plan with Dayton school officials. The following guidelines were set for the Master with respect to elementary students (A.104):

> 1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
>
> 2. Students should be transported to the nearest available school;

> 3. No student should be transported for a period of time exceeding (20) minutes, or two (2) miles, whichever is shorter.

The court also appointed a citizens board to monitor the plan for a period of at least three years. A.105. The court concluded its order with four conclusions of law: (1) "A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* . . . and *Swann* . . ." (A.105-06); (2) "Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such system" (A.106); (3) So long as such a desegregated system is established, "[e]ducational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations. . ." (*id.*); and (4) the Board "must provide adequate transportation for all students affected by reassignment to comply with this Order." *Id.* A judgment in conformity with this order was entered on the same day. A.107-109.

On March 15, 1976 the Master submitted his report. A.157-75. The Master recommended that elementary schools be desegregated primarily on the basis of the common technique of pairing schools. With respect to high schools, the Master relied on a program of choices and random assignments limited by racial guidelines. Under his plan, the Master estimated that the maximum distance of travel for any student would be somewhat in excess of 5 miles, but that the longest travel time "should not exceed 20 minutes." A.162.

The district court conducted a hearing on the Master's report on March 22 and 23, 1976. At this hearing,

the Dayton Board requested several modifications of the Master's plan: to be allowed to reassign pupils to paired schools in advance in the Spring by the central administration, rather than by the school principals on the first day of the 1976-77 school year; to be allowed to exchange paired schools (with no transfer of teachers) on an annual rather than semi-annual basis; to be allowed to assign high school students on geographic-zone rather than choice and random-assignment bases; and to phase in the elementary plan over three years (including withholding some 8 schools from the desegregation plan for the 1976-77 year). R.III. 288-89. The Board presented no argument, testimony, or any other evidence that any school or child should be excluded from the plan because of any geographic location or claim of excessive distance or time involved in reassignment and transportation.

On March 23, 1976 the district court entered its final order approving the proposed desegregation plan of the Master, with modifications, and directing the Dayton Board to implement the plan for the 1976-77 school year. A.110-13. The court gave the Board the discretion either to implement the Master's report or the Board's proposed modifications, except insofar as the Board sought a three-year phase-in of the plan at the elementary level. A.110-11. The district court also expressed its willingness to consider proposed modifications to the plan at any time from any party. A.112. A judgment was entered on March 25, 1976 in accordance with the March 23 order. A.114-16. Thereafter, the Dayton Board sought six additional modifications which, with one exception (concerning the exclusion of eighth graders from the plan), the district court approved by an order of May 14, 1976. A.117.

The Dayton Board then appealed, and their appeal was heard by the Sixth Circuit on an expedited basis. The court of appeals issued its decision in *Brinkman III* on July 26, 1976. A.118-23. The court of appeals noted that although its decision in *Brinkman II* had

> ordered system-wide desegregation, the Board proposed no plan to achieve this mandate and made no showing of the existence of conditions related to the topography of the Dayton area, location of natural or artificial barriers, geographic isolation or similar considerations which might militate against an order requiring cross-district transportation of pupils. [A.121.]

As to the Board's argument that the district court's guiding standard that each school should be within the district-wide racial ratio, plus or minus 15%, the court of appeals said (A.121-22):

> Rather than establishing a fixed mathematical requirement as the Board claims it does, this formula provides a flexible basis of pupil assignment similar to that approved by the Supreme Court in *Swann, supra.* The flexibility of the district court's judgment is further illustrated by the exemption of two entire grades of high school students, the provision for variations from the plus or minus 15% requirement "in exceptional circumstances" and the options granted the Board which permitted it to choose alternate methods of achieving desegregation rather than being required to follow in every detail the plan submitted by the Master. We view the use of mathematical ratios in this case as no more than "a useful starting point" in shaping a remedy for past discrimination. *Swann, supra,* 402 U.S. at 25.

As to the language in the district court's order of December 29, 1975 pertaining to a constitutional right

of all students to "share equally all facilities of a school system, both the superior and the inferior," the court of appeals said (A.122):

> When considered out of context and read literally the quoted language does appear to create a right which the federal courts have never recognized. However, in the context of the order this statement appears to be nothing more than an affirmation that a system-wide desegregation plan must necessarily involve all facilities of a school system and that pupil assignments will be made as required to eliminate the vestiges of past discrimination without regard to the comparative quality of the various facilities. Be that as it may, the quoted language does not appear in the judgment, which is the instrument this court reviews on appeal.

Finally, the court of appeals dealt with an argument raised by the Board for the first time at oral argument: that the district court's order required periodic changes in the Dayton plan to maintain a fixed racial balance in perpetuity in violation of this Court's intervening decision in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976). The court found that this contention was completely without merit: "The short answer to this argument is that the judgment directs no changes after the 1976-77 school year." A.123. The court noted that the plan ordered by the district court "established the first constitutionally sufficient desegregation plan for the Dayton system. If adjustments to this plan are sought by any of the parties in future years the district court will necessarily consider the limitations of *Spangler* in dealing with such requests." *Id.*

Thereafter, both the court of appeals and Mr. Justice Stewart, as Circuit Justice, denied the Board's applications for a stay of the judgment in *Brinkman III*, and the Board implemented the plan at the start of the 1976-77 school year. On January 17, 1977, this Court granted the Board's petition for writ of certiorari.

SUMMARY OF ARGUMENT

1. The linchpin of petitioners' case is their claim that the Dayton Board has never operated a racially dual school system as defined by this Court's decisions. If that claim is mistaken, their case falls. As set forth in the Statement of the Case, *supra,* there can be no doubt that a basically dual system existed at the time of *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), and was never dismantled until the federal-court intervention here. Thus, a district-wide desegregation plan was constitutionally required under *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. (1971), to dismantle the dual system which existed in Dayton at the time of *Brown* and which continued to flourish thereafter. *See* pages 58-71, *infra.*

2. Petitioners' case also falls on an alternative ground: the wide-spread *de jure* segregation extant at the time of *Brown,* coupled with racially discriminatory faculty and pupil assignment practices thereafter and the rescission of the Board's single undertaking of its affirmative obligations, constituted a *prima facie* case of system-wide intentional segregation which the Board has failed to rebut. The plan ordered below was therefore mandated by the "all-out

desegregation" commands of *Keyes* v. *School Dist. No. 1,* 413 U.S. 189 (1973), and *Swann. See* pages 72-85, *infra.*

3. The system-wide remedy already in place in the Dayton public schools is fair and equitable and is designed to remedy the constitutional violation. It is a plan of actual desegregation under *Swann* and *Keyes.* The plan is not "racial balance," nor does it require annual adjustments contrary to *Swann* or *Pasadena City Board of Educ.* v. *Spangler,* 427 U.S. 424 (1976). Petitioners' further claim that the plan will inevitably result in resegregation is not supported by the record and is irrelevant under this Court's decisions in *Brown* v. *Board of Educ.,* 349 U.S. 294 (1955) ["*Brown II*], *Cooper* v. *Aaron,* 358 U.S. 1 (1958), and *Monroe* v. *Board of Comm'rs,* 391 U.S. 450 (1968). *See* pages 85-94, *infra.*

4. Finally, petitioners' attack upon plaintiffs' status to prosecute this case is unwarranted. Plaintiffs include black and white pupils in the Dayton public schools who have suffered from petitioners' prior *de jure* segregated system of schooling and are now for the first time attending schools in transition to a racially unitary system. Under *Spangler,* plaintiff's stake in this controversy is real and their standing cannot be questioned. *See* pages 95-101, *infra.*

ARGUMENT

Before this Court, petitioners claim that the court of appeals has acted out of a desire to impose upon the Dayton school district system-wide racial balance as a matter of substantive constitutional right. To support

this argument the Board relies upon imprecise language in the various opinions and orders of the district court which have been superseded by the judgments of the court of appeals. Then, by interweaving excerpts from this free-wheeling language with equally selective citations to the extensive evidentiary record and even less-frequent references to the three decisions of the court of appeals, petitioners assert that the gaps between the system-wide remedy ordered below and any unconstitutional conduct on their part is so great that the conclusion is inescapable that the court of appeals has defined racial imbalance as a *per se* violation of plaintiffs' substantive constitutional rights. *See* Pet. Br. at 15-30.

We agree with petitioners that there are noticeable differences in pitch between the decisions of the court of appeals and those of the district court; and that the district judge did all he could on the first remand to avoid compliance with the court of appeals' mandate in *Brinkman I* to remedy the violation. *Cf.* Pet. Br. at 15-16, 28. We also agree that there are interstices in the decisions and orders entered below. But we find it considerably easier to fill in these gaps than do petitioners. The settled portions of the record bring the remedy flush with the constitutional violation and make constitutionally unassailable the determination below that plaintiffs are entitled to system-wide relief from the extensive *de jure* segregation of the Dayton public schools.

I. THE BOARD OPERATED A RACIALLY DUAL SCHOOL SYSTEM AT THE TIME OF *BROWN* WHICH WAS NOT DISESTABLISHED PRIOR TO IMPLEMENTATION OF THE DESEGREGATION PLAN ORDERED BELOW.

Petitioners necessarily concede that an "affirmative duty arises to dismantle and to eliminate the identifiability of one-race schools . . . [where there is] a finding of a dual system mandated by state statute or a dual system predicated upon evidence establishing state-imposed segregation in a substantial portion of the school district." Pet. Br. at 15. We concede that there was no Ohio statute mandating a dual system in Dayton after 1887. But there *has* been a dual school system in Dayton spanning two-thirds of a century, albeit one created and maintained by petitioners and their predecessors in direct defiance of state law.

In *Green* v. *County School Board,* 391 U.S. 430 (1968), and companion cases,[37] this Court refined the command of *Brown II* that school districts operating statutory dual systems must "effectuate a transition to a racially non-discriminatory school system." 349 U.S. at 301. *Green* emphasized that although the Court in *Brown II* had recognized that the transition would not be easy, "[s]chool boards...then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-38. Finally, in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S.

[37] *Raney* v. *Board of Educ.,* 391 U.S. 443 (1968); *Monroe* v. *Board of Comm'rs,* 391 U.S. 450 (1968).

1 (1971), and companion cases,[38] the Court held that the command "to dismantle dual school systems" (*id.* at 22) entails making "every effort to achieve the greatest possible degree of actual desegregation. . . . [and] warrants a presumption against schools that are substantially disproportionate in their racial composition." *Id.* at 26.

In *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973), the Court for the first time addressed the constitutional principles applicable to school segregation in the so-called "northern" context in which state law did not mandate racial segregation at the time of *Brown.* Because of the absence of state laws mandating school segregation in this context, the Court determined that plaintiffs challenging such school segregation under the Fourteenth Amendment "must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action." *Id.* at 198. In other words, plaintiffs must prove "*de jure* segregation" which is differentiated from "adventitious" segregation by official "*purpose* or *intent* to segregate." *Id.* 208 (emphasis in original). Although the initial burden of proof in such cases is therefore on the plaintiffs, the Court also held (*id.* at 201):

> [W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.

[38] *Davis* v. *Board of School Comm'rs,* 402 U.S. 33 (1971); *McDaniel* v. *Barresi,* 402 U.S. 39 (1971); *North Carolina State Board of Educ.* v. *Swann,* 402 U.S. 43 (1971).

In *Keyes* the Court reviewed lower court findings that the Denver School Board, with respect to the Park Hill area of the district, had been "found guilty of following a deliberate segregation policy at schools attended, in 1969, by 37.69% of Denver's total Negro school population, including one-fourth of the Negro elementary pupils, over two-thirds of the Negro junior high pupils, and over two-fifths of the Negro high school pupils." *Id.* at 199. With respect to the remainder of the system, however, the lower courts in *Keyes* had found no such deliberate segregative policies or practices. This Court nevertheless recognized that racially discriminatory practices of segregating blacks in one portion of a school district have a "reciprocal effect" on the remainder of the district: "common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Id.* at 203; *see also id.* at 201-203. Consequently, a dual system may be found to exist upon "proof of state-imposed segregation in a substantial portion of the district. . . ." *Id.* at 203. The Court held that the Denver school district's "deliberate racial segregation policy with respect to the Park Hill schools [would be sufficient to] constitute[] the entire Denver school system a dual school system" (*id.* at 204), unless the school board could show "that Park Hill may be separated from the rest of the Denver school district as a separate, identifiable, and unrelated unit." *Id.* at 205.

The Court also noted that where such a "northern" dual system is found, "as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effectuate a transition to a racially non-discriminatory school system.'" *Id.*, quoting *Brown II.*

In determining whether school authorities have met this "affirmative duty," the Court explained one of the reasons supporting the *Swann* presumption against one-race schools in a system with such a history of segregation (413 U.S. at 211):

> a connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.

A. A Dual System Existed In The Dayton Public Schools At The Time Of *Brown I.*

The record in the instant case, which we have detailed at pages 8-19, *supra,* conclusively shows the existence of such a dual school system in Dayton at the time of *Brown.* At that time, a substantial majority of the black public school children in Dayton attended schools which had been deliberately created or converted into schools for blacks only. And almost *all* black teachers in the system were assigned to these blacks-only schools pursuant to an explicit and degrading policy of racial discrimination. This state-imposed system of intentional segregation was probably as perfect as it could have been without the aid of a state law mandating absolute apartheid.[39] No showing was or

[39] As shown in the Statement, *supra,* the Board was operating about 50 schools at the time of *Brown.* Of the 35,000 pupils in the system, 19% were black. At least 54% of the system's black students were attending four schools officially designated for blacks only, and at least another 19% of the black pupils in the system were attending five other schools that had just been effectively converted (one had just been constructed) into black schools. Thus, about three-fourths of all black pupils attended black schools, and

could have been made that the resulting segregation was cabined "within a separate, identifiable or unrelated unit" (*Keyes*, 413 U.S. at 205) of the Dayton school district. Under *Keyes*, therefore, no conclusion is permissible except that the Dayton Board was operating a dual system at the time of *Brown*.

Petitioners assert the contrary, however, as they must; their entire brief is premised on the assertion that there was never such a dual system in Dayton. They cite no evidence to support this claim, and they cite no finding by the court of appeals. Nor do they refer to the district court's initial findings of fact and conclusions of law to support the proposition that makes or breaks their case. Rather, they refer to language written for the first time by the district court on remand following the court of appeals' reversal in *Brinkman I* of the district court's "free choice" remedy. Pet.Br. at 10, 19, 30. This language of the district court makes no reference to the controlling standards announced in *Keyes* the year before. Its total content is as follows (A.75, 77):

> 1. The State of Ohio does not now, nor has it since 1887 mandated a dual system of public education. To the contrary, 84 Ohio Law 34, dated February 22, 1887, specifically required a unitary public school system.
>
> 2. The defendant School Board of the City of Dayton had engaged in activities which were segregative in effect and which did impinge upon the Constitutional rights of students in such system. At no time, however, did defendant maintain a dual system of education.

83% of the system's white pupils attended virtually all-white schools. *See* pages 15-16, *supra*.

> 3. Overt evidence of such segregative activities have been eliminated both by action of the Board of Education and by previous Order of this Court but the effect thereof may not.
>
> * * *
>
> We do not deal with a mandated dual system; we do not deal with actions taken on a school-by-school basis. We do deal with a system that has in the past permitted segregative practices to exist.

These words will not support petitioners' claim.

We recognize that "[j]udges who are reversed by a higher court sometimes need . . . [an] outlet," and that "[f]or this reason opinions on remand should occasionally be read with tolerance and understanding. . . ."[40] Petitioners, however, assert that the above-quoted language "establishes that the Dayton district was not operating a mandated dual system as proscribed in *Brown I* . . . [and was not guilty of] state-imposed segregation in a substantial or significant portion of the district . . . ." Pet.Br. at 19. There are several reasons why petitioners' contention is not tenable, whether the district court's language is viewed with sympathy or critical analysis.

First, as previously noted, the district court's references to the "dual system" were made at the remedial stage of this case following a reversal and remand for remedy by the court of appeals. The district court made no such finding and offered no such conclusion in its opinion issued immediately following the trial on the merits. Indeed, at that time the court did not dispute the existence of a dual system at the time of

[40] *Stanton* v. *Stanton*, 45 U.S.L.W. 3506 (U.S. Jan. 25, 1977) (Stevens, J., dissenting in part).

Brown. Rather, the court's first opinion simply discounted the eggregious facts of pre-*Brown* discrimination because of its view that "[b]oth by reason of the substantial time that has elapsed and because these practices have ceased, . . . [they] will not necessarily be deemed to be evidence of a continuing segregative policy." A.3. That off-hand disposition, of course, turned out to be a legal mistake in light of this Court's subsequently-issued opinion in *Keyes,* 413 U.S. at 210-11:

> We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less "intentional."

But even after the *Keyes* opinion became available, the district court did not reassess this mistake; instead, its only discussion of *Keyes* focused exclusively upon the dissenting part of Justice Powell's separate opinion. A.29-31; *see also* note 36, *supra,* and accompanying text.

Second, the language of the district court reveals no understanding of the term "dual system." As nearly as one can tell from reading the district court's "dual system" references—indeed, from reading the March 10, 1975 order in its entirety—the district court believed that a dual system could not exist unless mandated by state law. This notion, of course, was also expressly rejected in *Keyes*. 413 U.S. at 201-204.

Third, whatever the district court may have meant in that order, it was squarely rejected by the subsequent decision of the court of appeals in *Brinkman II*. In that opinion, the Sixth Circuit, stating that it would have granted plaintiffs' motion for summary reversal but for the time factor, held (A.90):

> Although the phrase "de jure" does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices. *See Keyes* v. *School District No. 1,* 413 U.S. 189 (1973).

Petitioners' reliance on the district court's language in the March 1975 order is therefore unfounded because that order has been displaced by the court of appeals in accordance with this Court's decision in *Keyes*.[41]

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[41] This case does not call for further elaboration of the *Keyes* "*purpose* of *intent* to segregate" standard. 413 U.S. at 208 (emphasis in original). *See also Castaneda* v. *Partida,* 45 U.S.L.W. 4302 (U.S. March 23, 1977); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977); *Washington* v. *Davis,* 426 U.S. 229 (1976). While we do not understand the standard to require us to accuse petitioners and their predecessors of subjective racial malevolence, *cf.* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction,* 86 YALE L.J. 317 (1976), the record here supports such an accusation. But we also think it clear that inquiry into the *subjective* motive of the decision-maker is not required. As Justice Stewart has written, while he was a Sixth Circuit Judge, in *Clemons* v. *Board of Educ. of Hillsboro,* 228 F.2d 853, 859 (6th Cir. 1956):

> The Board's action was . . . not only entirely unsupported by any color of state law, but in knowing violation of the Constitution of the United States. The Board's subjective purpose was no doubt, and understandably, to reflect the 'spirit of the community' and to avoid 'racial problems,' as testified by the Superintendent of Schools. But the law of Ohio and the Constitution of the United States simply left no room for the Board's action, whatever motives the Board may have had.

Similarly, the lower courts in the "northern" school cases decided

Fourth, and finally, the claim that the Dayton Board never operated a dual school system is wrong as a matter of uncontestable fact. Although the court of appeals can be criticized to some extent for occasionally adopting the loose approach to constitutional terminology that pervades the district court's opinions and orders, it is at least unmistakably clear from the court of appeals' judgment that it thought plaintiffs had proved their entitlement to a system-wide remedy. It is that judgment which we appear here to defend. Moreover, it is also plain from the court of appeals' determination of facts in both *Brinkman I* and *Brinkman II* that it believed that plaintiffs had proved intentional segregation of system-wide magnitude. While there may be some dispute as to whether the court of appeals precisely anchored its holding on the existence of a dual system at the time of *Brown*,[42]

in the post-*Keyes* era have generally not required plaintiffs to prove subjective racial animus. *See, e.g., Armstrong* v. *Brennan*, 539 F.2d 625 (7th Cir. 1976); *United States* v. *School Dist. of Omaha*, 521 F.2d 530 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); *Hart* v. *Community School Bd. of Educ.*, 512 F.2d 37 (2d Cir. 1975); *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Oliver* v. *Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Bradley* v. *Milliken*, 484 F.2d 215 (6th Cir. 1973), *aff'd in relevant part*, 418 U.S. 717, 738 n.18 (1974). Rather, these cases require only a showing of objective purpose or intent to segregate

[42] We believe, however, that a fair reading of the court of appeals' opinions shows its recognition of the existence of a *de jure* segregated system at the time of *Brown*. First, in *Brinkman I*, the court discusses the "Historical Background of School Segregation in Dayton." A.39-48. In this discussion, the court recounts that in the face of Ohio law outlawing racially discriminatory schooling since at least 1888 and a 1926 Ohio Supreme Court decision expressly informing the Dayton Board not to segregate schools on the basis of race, the Dayton Board nonetheless, as found by the

the record irrefutably establishes such a system. *See* note 39, *supra*.[43] Petitioners' assertions of non-dualism must accordingly be rejected.

district court, proceeded to do so. A.39-40. The court of appeals did not elaborate on the evidence supporting this "historical determination" because "that is not challenged on appeal . . ." A.39. Second, again in *Brinkman I*, the court of appeals notes the "basically dual school system inherited at the time of *Brown*" and the "explicit segregation policy of the Board" prior to the 1951-52 school year and effective continuation thereafter, in discussing but not deciding other violation issues on which it reserved decision. A.56. Third, again in *Brinkman I*, the court of appeals, in describing the Board's remedial obligations, held (A.68):

> Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Keyes, supra*, 413 U.S. at 200.

Thus, the court of appeals, as required by *Keyes*, directly rejected, on the facts of this case, the Dayton Board's contention "that the *Brown I* rationale relied upon by the plaintiffs is only applicable to those school districts where a dual system was compelled or authorized by statute and has no applicability where a statutory dual system has never existed." Brief for Dayton Board of Education, 6th Cir. Nos. 73-1974, -1975, at page 22. Finally in *Brinkman II*, the court of appeals reiterated this statement of the affirmative obligation of a dual school system (A.90), and recounted the long history of *de jure* segregation in the Dayton public schools (A.89-90).

[43] The existence of a dual system at the time of Brown thus need not depend on the burden-shifting principles and evidentiary presumptions set forth in *Keyes*. *See* Argument II, *infra*. The existence of such a system is established as a matter of overwhelming fact. We cannot conceive how the Dayton-style dual system could have lesser legal consequence than the Charlotte-Mecklenburg type, for comparative example. There is a small factual difference, of course, since in Dayton 75% of the students were directly segregated by race in 1954, compared to 100% in Charlotte. To draw from this factual difference a conclusion that the two systems had different long-run consequences, however, is to make finer socio-

When *Brown I* was decided on May 17, 1954, therefore, the Dayton Board became constitutionally obliged to uproot the dual system it had spent at least forty years creating in doubtful compliance with *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), and in open defiance of equally-longstanding Ohio law. In the fifteen years following *Brown* the Dayton Board may have complied in some respects with *Plessy* (*see* note 36, *supra*), but it ignored *Brown.*

B. The Board Never Complied With *Brown II.*

At this point petitioners' case collapses in this Court just as it did in the court of appeals. For once the existence of a dual system at the time of *Brown* is established, the remedial principles of *Brown II* and its progeny become applicable. *See Keyes, supra,* 413 U.S. at 200-203, 213-14; *Brinkman I,* 503 F.2d at 704 (A.68); *Brinkman II,* 518 F.2d at 854 (A.90). Under these principles, the Board was obligated from the time of *Brown II* to disestablish the basically dual school system inherited. To fulfill that obligation, the Board had to "make every effort to achieve the greatest possible degree of actual desegregation . . . [C]ompliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition." *Swann, supra,* 402 U.S. at 26. Or, in the language of one of the *Swann*

logical distinctions than either social scientists or federal judges are capable, or than the Fourteenth Amendment requires. *Keyes,* 413 U.S. at 200-03. And clearly the fact that this dual system was created in defiance of, rather than being mandated by, state law does not alter the constitutional consequences of the Dayton Board's intentional segregation at the time of *Brown. Cf. Monroe* v. *Pape,* 365 U.S. 167, 194-201 (1961) (Harlan, J., concurring).

companion cases, the Board was required to "make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners, supra,* 402 U.S. at 37.

The Dayton Board has never contended that it has met its affirmative obligation under these post-*Brown* mandates. Nor could it. *See* A.5, 9-10.

Indeed, the courts below have found that instead of "eliminat[ing] from the public schools all vestiges of state-imposed segregation" (*Swann, supra,* 402 U.S. at 15), petitioners and their predecessors aggravated the constitutional violation by continuing to engage in a number of racially discriminatory practices. For example, at least until federal intervention by HEW in 1969, the Board persisted in the "racial assignment of faculty" (A.56) by assigning black teachers to identifiably black schools and white teachers to identifiably white schools. *See* pages 20-24, *supra; Swann, supra,* 402 U.S. at 18; *Keyes, supra,* 413 U.S. at 209.[44] In addition, the Board, as found by the courts below, intentionally employed optional attendance zones with the segregative effect of identifying schools as black

[44] Petitioners appear to argue (Pet. Br. at 18) that the Board's employment of substantial numbers of black teachers is evidence of affirmative action. However, in school systems in almost every state which had explicit segregation laws the proportionate number of black teachers was as substantial as in Dayton. And as in Dayton, the "southern" districts also assigned pupils and teachers to schools, in the words of *Brinkman I,* "pursuant to an explicit segregation policy." A.56. Thus, the presence of a substantial number of black teachers may in some cases be evidence of non-discriminatory hiring; in others, it is the legacy of an explicitly dual system of hiring and assigning teachers on a racial basis, as in Dayton.

or white and allowing white children assigned to the attendance areas for black schools to escape. *See* pages 24-30, *supra*. This device, reminiscent of the mainstay of the "southern" style of dualism (*see Green, supra,* 391 U.S. at 432), was totally inconsistent with the Board's avowed purpose of operating under the "neighborhood school concept." *See, e.g.,* A.13.

Other Board action, at a minimum, was ineffective in dismantling the dual system. For example, the Board's Freedom of Enrollment policy only perpetuated the racial identity of schools. A.9-10; *See* note 28, *supra*. In practice, this policy operated as ineffectively as the "freedom of choice" and "free transfer" provisions condemned in *Green* and companion cases as wholly inadequate desegregation techniques. The Dayton policy was simply "a method [of] achieving minimal disruption of the old pattern. . . ." *Monroe* v. *Board of Commissioners, supra,* 391 U.S. at 458.[45]

[45] While the district court declined to find segregative intent with respect to several pupil-assignment practices, it did affirmatively find that "no effort has been made by the school board of Dayton to balance by race the student population at any particular school" (A.5), and that the "affirmative promotion of integration . . . has not held an important place in the Board's priorities." A.30. As previously noted (*see* note 33, *supra*), "balance by race" and "racial imbalance," in the confusing usage employed by the district court, mean, respectively unsegregated and segregated. The district court's findings that the Board's zoning practices have had "neither segregative nor integrative effect" (A.6), that the Board used its site-selection and school-construction practices to locate schools in one-race areas (A.7), and that the Freedom of Enrollment policy was of negligible desegregative value (A.9), foreclose any possibility that the Board has complied with *Brown II*. Although these district court findings have been superseded by the court of appeals' decision in *Brinkman I* (A.61-67) reserving decision on plaintiffs' contention that the Board's practices in these

Not until 1971 did the Board stand up to its sworn duty and act decisively by adopting a system-wide program of desegregation to comply with its duty to convert to a unitary system. But this affirmative action by the 1971 Board was quickly rescinded by the newly-composed 1972 Board and the dual system reinstated. *See* pages 30-35, *supra*. "This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system." *Green, supra,* 391 U.S. at 438.

Clearly and convincingly, plaintiffs have established their entitlement to a system-wide remedy under this Court's controlling decisions in *Brown II, Green, Swann* and *Keyes*.

areas constitute "independent constitutional violation[s]" (*Washington* v. *Davis,* 426 U.S. 229, 243 (1976), quoting *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 459 (1972)), the law of the case *at least* establishes that the Board never fulfilled its affirmative obligations to dismantle the dual system. " 'Racially neutral' assignment plans," are inadequate as a matter of law when they "fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation." *Swann, supra,* 402 U.S. at 28. The Board's pre-*Brown* practices presented just such a " 'loaded game board,' " which required the Board in the post-*Brown* era to take "affirmative action in the form of remedial altering of attendance zones . . . to achieve truly nondiscriminatory assignments." *Id.* Even if it be assumed *arguendo* that the Board was totally "color blind" after *Brown,* that was plainly not enough. This Court has denounced as wholly inadequate a policy that "exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illustory the promise of *Brown. . . .*" *North Carolina State Board of Educ.* v. *Swann, supra,* 402 U.S. at 45-46. *See also McDaniel* v. *Barresi, supra,* 402 U.S. at 41.

II. ALTERNATIVELY, PLAINTIFFS MADE OUT AN UNREBUTTED *PRIMA FACIE* CASE OF SYSTEM-WIDE INTENTIONAL SEGREGATION REQUIRING A SIMILAR REMEDY.

We think the foregoing argument is sufficient to refute petitioners' contention that plaintiffs are not entitled to comprehensive relief. If for reasons not apparent to us we are wrong, then we submit that proper application of the burden-shifting principles announced in *Keyes* is dispositive. This argument need not be reached unless the Court determines that *Brown II* relief (*i.e.*, as enunciated in *Green* and *Swann*) is triggered only to eliminate the vestiges of that total segregation mandated by express state laws existing at the time of *Brown I*. In our view, that result would balkanize the Fourteenth Amendment, giving it a different practical meaning for the North than it has for the South. Even if we are wrong in reading *Keyes*, 413 U.S. at 200-03, 213-14, as specifically rejecting that regional approach to remedy, the law of violation settled by *Keyes* mandates system-wide relief for plaintiffs.

A. Plaintiffs' Made Out A *Prima Facie* Case Of System-Wide *De Jure* Segregation.

There are four elements to our *prima facie* case under the burden-shifting principles set out in *Keyes*: (1) the "northern"-style dual system extant at the time of *Brown;* (2) the continued racial assignment of faculty at least until 1969; (3) racially discriminatory optional attendance zones created and maintained throughout the post-*Brown* era; and (4) the 1972 Board's rescission of the 1971 Board's desegregation program.[46]

[46] The court of appeals reserved decision on, and thereby suspended, the district court's findings with respect to site selection and school construction, grade structure and reorganization, and pupil transfers and transportation. We have summarized the evidence relating to these areas in Appendix A, attached hereto (*see* note 14, *supra*). In our view, these facts prove beyond a reasonable doubt and to a moral certainty that the entire Dayton system in all relevant school administrative practices is infected with intentional racial discrimination. It is also our firm belief, however, that Argument I above is conclusive and the points made in this Argument II are more than adequate under the burden-shifting principles of *Keyes*, without regard to these reserved issues. If the Court rejects both Arguments I and II, however, then it will be necessary for this Court either to evaluate the evidence set out in Appendix A or, "rather than deal with the merits of the question in this Court" (*Dandridge* v. *Williams*, 397 U.S. 471, 476-77 n.6 (1970)), to remand to the court of appeals for its disposition of these reserved issues.

1. Dayton's 1954 dual system "did not relate to an insubstantial or trivial fragment of the school system." *Keyes, supra,* 413 U.S. at 199. Rather, it contained a substantial majority of Dayton's public school pupils in schools intentionally segregated on the basis of race. Moreover, virtually all faculty and staff were then deliberately assigned to schools on a racial basis, with "the clear effect of earmarking schools according to their racial composition. . . . " *Id.* at 202. It is therefore doubtful that there was not a racially identifiable school in Dayton in 1954. *See* pages 15-19, *supra.* And this extensive separation of the races was the direct product of outspoken, official racial discrimination beginning at least as early as 1912 and continuing, perhaps with modification but surely without interruption, until 1954. It may not have been a perfect system of complete segregation, but the breaches were few and far between. *See* pages 18-19, *supra.*

2. The assignment of faculty and staff on the basis of race continued with slight change until 1969, when

HEW, under its mandate of Title VI of the Civil Rights Act of 1964, objected to the Board's "policy of racially motivated assignment of teachers and other professional staff." A.415.[47] Only then did the Board begin to effectively disestablish the dual system of faculty and staff assignments. But simple faculty desegregation that late in the day was plainly not enough to counter the entrenched effects of this longstanding practice of intentional segregation, which for over 60 years had "earmark[ed] schools according to their racial composition." *Keyes, supra,* 413 U.S. at 202. *See* note 20, *supra,* and accompanying text.[48]

3. We have previously outlined the evidence showing the racially discriminatory operation of optional

[47] The court of appeals reserved ruling only on whether the racial identifiability of faculty assignments at the time of trial constituted a continuing faculty-assignment constitutional violation. *See* note 14 and page 44, *supra.*

[48] In Dayton the pre-*Brown* faculty-assignment policy did much more than just "earmark" schools as "black" or "white." As the court of appeals determined in *Brinkman I*, the Dayton Board long "assigned all black teachers only to schools with all black pupils . . . pursuant to an explicit segregation policy of the Board." A.56. Through 1951 this "explicit segregation policy" *never* allowed a black teacher to instruct a white child; as a result, every time the Board assigned black teachers to a class or school, its explicit policy and unswerving practice was also to exclude or otherwise transfer all white students (and their white teachers) to other classrooms and schools and to assign only black students to these all-black schools. *See* pages 8-15, 18-19, *supra.* There is little wonder therefore that, when the Board in 1951-52 substituted an ostensibly new policy concerned only with the racial preferences of white teachers and white schools, the former policy "effectively continued in practice through the 1970-71 school year." A.56. And the effect of this continuing racial practice on the identification of schools as "black" or "white" was nearly as great, albeit not as direct, as the former policy.

attendance zones. *See* pages 24-30, *supra.* This is a classical segregation device, which the lower courts have found to exist with considerable regularity in the "northern" cases;[49] and they have consistently concluded that such optional zones are, in Judge Wisdom's words, "unadulterated segregation." *United States* v. *Texas Education Agency,* 467 F.2d 848, 867 (5th Cir. 1972). Petitioners' effort (Pet.Br. at 22-25) to minimize the impact of this conceded unconstitutional practice makes too little of the district court's findings and not enough of the record. The district court's general finding with respect to optional zones specifically identifies four examples effecting segregation at seven schools (including one of the six optional zones created in the West-Side Reorganization in 1952 (*see* note 21, *supra*)). A.8. When the finding of a city-wide blacks-only optional zone for high school students is included (A.4-5),[50] *all* high schools were also directly affected by such "unadulterated segregation." In addition to city-wide zones, the unrebutted evidence shows that optional zones directly effected segregation between some 15 pairs of schools substantially disproportionate in their racial composition. *See* pages 25-26, *supra.* By any definition, 30 schools in a system with less than 70 schools relates to much more than "an insubstantial or trivial fragment of the school system." *Keyes, supra,* 413 U.S. at 199; *see also id.* at 201-05.[51]

[49] *See, e.g., United States* v. *School Dist. of Omaha, supra,* 521 F.2d at 540-43, and cases cited; *Bradley* v. *Milliken, supra,* 484 F.2d at 232-35, and cases cited.

[50] *See* note 10, *supra.* In addition, Patterson Co-Op for many years functioned as a city-wide high school for whites. *See* note 22, *supra.*

[51] The elimination of such optional zones does nothing to limit

4. The final element of the *prima facie* case is the Board's rescission of its 1971 resolutions to desegregate the Dayton public schools. The rescission might have lesser constitutional significance if the 1971 resolutions had been predicated solely, or even primarily, upon a determination that, as a matter of educational policy, the public schools should be integrated "in order to prepare students to live in a pluralistic socety. . . ." *Swann, supra,* 402 U.S. at 16. But that was not the case. Rather, the desegregation resolutions were premised upon the Board's admission that it and its predecessors, through various racially discriminatory pupil and faculty assignment policies and practices, had caused racial segregation in the public schools. Importantly, that admission was not proposed, in surprise fashion, for the first time on December 8, 1971. The Board had first admitted its responsibility in the resolution of April 29, 1971 setting up the Committee of 75. The Committee of 75, in its report, likewise found that the Board and its predecessors bore responsibility for the pervasive racial segregation in the Dayton system. In addition, the Board's liability had been determined earlier the same year in emphatic terms by the Ohio State Board of Education; and suggested even earlier, in 1969, by HEW. *See* pages 30-34, *supra.* Consequently, the Board's December 8, 1971 decision to desegregate the system was the considered product of determinations that affirmative remedial

their historic contribution to the current condition of segregation. *See* pages 27-29, *supra.* Moreover, as the district court found, the use of optional zones also serves "to destroy or dilute the neighborhood school" (A.13) defense asserted by the Dayton Board as the supposedly otherwise "racially neutral" cause of school segregation.

action was required to comply with the Board's constitutional obligations. When the new Board voted on January 3, 1972, to rescind this desegregation program and reinstate segregation across the board, it did more than simply make a different judgment about appropriate educational policy. It deliberately turned back the clock in a demonstrably segregative fashion. And it did so without offering any evidence to show that the uniform conclusions of HEW, the Ohio State Department of Education, the Committee of 75, and the 1971 Board and Superintendent of Schools, were either precipitous or incorrect. The rescission thus intentionally reimposed segregation on a system-wide basis. It was, *prima facie,* a purposeful act of racial discrimination infecting the entire system and again communicating a policy of segregation to all of the city's citizens. Whether or not the rescission viewed in isolation is unconstitutional under the Equal Protection Clause, in its total context it is, at a minimum, a significant element of plaintiffs' *prima facie* case.[52]

[52] Plainly, if the Board was under an affirmative constitutional duty to desegregate, as the court of appeals held in *Brinkman I* (A.55-56), the rescission of a desegregation plan was unconstitutional. *Cf. North Carolina State Bd. of Educ.* v. *Swann, supra.* While we agree with the court of appeals that, in this context, the constitutionality of the rescission standing alone need not be reached, we would argue, if necessary, that the rescission is unconstitutional without regard to the Board's affirmative duty to desegregate. *Cf. Nyquist* v. *Lee,* 402 U.S. 935 (1971), *aff'g* 318 F. Supp. 710 (W.D. N.Y. 1970) (three-judge court). The patent purpose of the rescission was to maintain racially segregated schooling. Moreover, the Board's rescission action singled out pupil reassignments for the purpose of desegregation and, with respect to such assignments, stripped the Superintendent of Schools of his otherwise unqualified state-law authority over intra-district student assignments. *See* note 30, *supra.* This was "an explicitly racial classification treating racial [pupil assignment] matters dif-

Were it necessary, we would have no reluctance in arguing that any one of the foregoing factors constitutes a *prima facie* case of system-wide intentional segregation shifting to the Board the burden of demonstrating at the time of trial that the condition of almost total pupil segregation was "adventitious." *Keyes*, 413 U.S. at 208. For purposes of this case, however, it is dispositive that the four factors taken together constitute such a *prima facie* case under *Keyes*.[53]

ferently than other . . . . [pupil assignment] matters." *Hunter* v. *Erickson*, 393 U.S. 385, 389 (1969). These facts are more than sufficient to "trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considertaions." *Washington* v. *Davis*, *supra*, 426 U.S. at 242. Nevertheless, we are content for purposes of this argument, to have the rescission treated as one of the elements of plaintiffs' *prima facie* case. As such, the other wide-spread practices of deliberate segregation conclusively show that the rescission was an act of system-wide intentional racial discrimination, and the rescission, in turn, compounds the harm of the other racial acts. Taken together, the four elements make a strong case for the conclusion that the Dayton Board had steadfastly pursued a long-standing plan of purposeful racial separation in all aspects of public schooling.

[53] In *Keyes* the Court applied considerations of "policy and fairness" in concluding that a burden-shifting principle is appropriate in racial segregation cases such as this, where plaintiffs prove a substantial amount of intentional segregation. 413 U.S. at 209, quoting 9 J. WIGMORE, EVIDENCE § 2486, at 275 (2d ed. 1940). We think this burden-shifting approach also finds ample support in the "ordinary rule" that a party has the burden of proving facts peculiarly within its own knowledge. *United States* v. *New York, N.H. & H.R.R.*, 355 U.S. 253, 256 n.5 (1957). The "northern" school cases, in general, fit this rule like a glove. While it is true that many of the relevant facts (e.g., construction of new schools, boundary changes) are "public" knowledge, it is also true that the segregative intent underlying these "public" facts is rarely above board. *See generally Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977). The

Plaintiffs' *prima facie* case here is considerably more powerful than that presented in *Keyes*, which consisted only of deliberate segregation in one portion of the city containing about 38% of the black students. Here we have shown that, in addition to the intentional segregation of a substantial majority of the students and virtually all of the faculty at the time of *Brown*, and in addition to the periodic discriminatory use of optional attendance zones effecting segregation in a substantial portion of the schools in the system, the Board engaged in two intentional acts of segregation having across-the-board impact: the assignment of faculty and staff on a segregated basis until at least the 1970-71 school year, and the 1972 rescission deliberately reinstating system-wide pupil segregation.

B. The Board Has Failed To Rebut Plaintiffs' *Prima Facie* Case

Plaintiffs' *prima facie* case thus raised two presumptions of intentional system-wide segregation. The first is that because the four *de jure* practices that comprise plaintiffs' *prima facie* case affected a substantial

inherent difficulty of meeting this legal standard, combined with the mismatch of resources (full-time, fuly-paid school board lawyers and professional staffs opposed to the limited resources of private plaintiffs, even those with the backing of civil rights organizations), imposes a greater burden on plaintiffs, even under a burden-shifting standard, than the ordinary civil litigant ever faces. Hence, when plaintiffs such as those here prove intentional discrimination with respect some meaningful portion of the school system, justice demands that the burdens of proof shifts to the school board. These points are not particularly urgent in the present case, because plaintiffs here have made out an overwhelming case of intentional system-wide segregation. We therefore make the points in this note to caution the Court against using this unusually strong case to set a standard that would be unrealistic for the many other cases in which system-wide racial discrimination can otherwise be proved to an acceptable degree of confidence.

portion of the system, these "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions" ordinarily sufficient to render the system dual. *Keyes*, 413 U.S. at 203, 213. To overcome this presumption, the Board must demonstrate that its four intentionally segregative practices were compartmentalized within "separate, identifiable and unrelated units" of the system so that in combination they affected less than the whole system. *Keyes*, 413 U.S. at 201-05, 213. If the Board fails in that burden, plaintiffs are entitled to comprehensive relief. *Keyes*, 413 at 213.

Should the burden just described be met, it is then incumbent upon the Board to dispel the second presumption: "there is high proability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system." 413 U.S. at 208. To meet this second burden, the Board must show clearly and convincingly that "segregative intent was not among the factors which motivated their actions." 413 U.S. at 210. If the Board fails to meet this burden, "all-out desegregation" is required absent a showing by the Board that such intentional actions "were not factors in causing the exsting condition of segregation." 413 U.S. at 214.[54]

[54] In *Keyes* the Court approvingly cited a number of lower court decisions holding that "in a school system with a history of segregation, the discharge of a disproportionately large number of Negro teachers incident to desegregation 'thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence.' " 413 U.S. at 209. We think "clear and convincing evidence" is the degree of proof required of a school board responding to a *prima facie* case consisting of a showing of intentional racial segregation with respect to a significant portion of the system.

Turning to the first of these burdens, *Keyes* counsels that the "cases must be rare" (413 U.S. at 203) where school authorities can show that the effects of a sub-

Such a school board should be put to a "higher degree of proof than applies in a negligence case." *Woodby* v. *Immigration & Naturalization Service*, 385 U.S. 276, 285 (1966). *See generally* C. McCormick, Law of Evidence § 320, at pp. 679-81 (1954); 9 Wigmore, Evidence § 2498 (3d ed. 1940); McBain, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242 (1944). A "clear and convincing" or "clear, unequivocal and convincing" standard of proof is especially appropriate where a constitutional right or human liberty is at stake. *See, e.g., Berenyi* v. *District Director*, 385 U.S. 630, 636-37 (1967); *Woodby* v. *Immigration & Naturalization Service, supra; New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285-86 (1964); *Costello* v. *United States*, 365 U.S. 265 (1961); *Nowak* v. *United States*, 356 U.S. 660 (1958); *Gonzales* v. *Landon*, 350 U.S. 920 (1955); *Schneiderman* v. *United States*, 320 U.S. 118 (1943). In employment discrimination cases, for further examples, the lower courts have uniformly required employers to respond to *prima facie* cases of systematic discrimination with "clear and convincing" evidence. *See, e.g., Day* v. *Mathews*, 530 F.2d 1083 (D.C. Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 444-45 (5th Cir.), *cert. denied*, 419 U.S. 1033 (1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 259-60 (5th Cir. 1974); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1374-80 (5th Cir. 1974); *United States* v. *Chesterfield County School Dist.*, 484 F.2d 70, 72-73 (4th Cir. 1973); *Cooper* v. *Allen*, 467 F.2d 836, 840 (5th Cir. 1972).

Such a degree of proof is called for in cases such as the present one by "the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Washington* v. *Davis, supra*, 426 U.S. at 242 *See also Hunter* v. *Erickson, supra; McLaughlin* v. *Florida*, 379 U.S. 254 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967). While the "strict scrutiny" standard relates to the burden of justification, as distinguished from the burden of proof, we submit that exacting evidentiary requirements are essential to securing the constitutional interests protected by the "strict scrutiny" rule. Certainly, "the duty of prevailing by a mere preponderance of the evidence" (*Woodby, supra*, 385 U.S. at 285), is incompatible with that goal. Here plaintiffs have established, *prima facie*, an intentional sys-

stantial amount of intentional segregation "can be treated as isolated from the rest of the district." 413 U.S. at 213. Here, the Board did not and could not show that the virtually complete pupil and faculty segregation at the time of *Brown,* the racially segregative optional zones affecting more than a third of the schools at one time or another, the deliberate racial discrimination in the assignment of teachers and other professional staff for more than fifteen years after *Brown,* and the 1972 rescission and reimposition of system-wide pupil segregation were directed at "different areas of the school district [which] should be viewed independently of each other." *Keyes,* 413 U.S. at 208. The Board could not and did not show that these pervasive acts of intentional segregation were aimed at either geographic parts of the district or aspects of school administration which were "separate, identifiable and unrelated units." *Id.* at 203. This is

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tem-wide "racial classification." "Strict scrutiny" mandates that the Board must disprove that case by "clear and convincing" evidence. It is under just such a standard, we believe, that this Court has "never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system." *Keyes,* 413 U.S. at 200.

If we are right about the Board's burden of proof, then we are clearly correct in saying that it is not legally possible for the Board to meet its burden. The "clear and convincing" standard requires the Board to demonstrate that it is "highly probably true" that the presumptions raised by plaintiffs' *prima facie* case are unfounded. *See,* McBain, *supra,* 32 CALIF. L.REV. at 254, 262-63. Since the court of appeals has determined that there are "serious questions" as to whether the Board's case with respect to the reserved isues (*see* note 46, *supra*) is "supported by substantial evidence" (*Brinkman I,* A.66-67), it follows, as a matter of law, that the Board cannot overcome plaintiffs' *prima facie* case with "clear and convincing" evidence.

not surprising in this compact district where the Board could make "no showing of the existence of conditions related to the topography of the Dayton area, location of natural or artificial barriers, geographic isolation or similar considerations" (A.121) which might hinder system-wide desegregation. The Board has failed to meet its burden. The existence of a dual system in Dayton is thereby established.

Even if the Board could overcome the first burden by showing that its intentional actions had effects limited to a separate and distinct portion of the system, the Board still did not meet its second burden of showing that segregative intent was not *one* of the factors underlying its other, ostensibly racially neutral practices. These practices include school construction and site selection, grade structure and reorganization, and pupil transfers and transportation. Although the district judge here, as in *Keyes,* generally found or implied that these other practices were racially neutral, it did so on the erroneous assumption that plaintiffs bore the burden of proof throughout. The court of appeals reserved decision on whether these other practices amounted to unconstitutional, intentional segregation in their own right. But it did review the evidence and determine that there are "serious questions" (A.66) as to whether the Board's claims of racial neutrality are supported by "substantial evidence." A.67. This determination makes it legally impossible for the Board to show that it is "highly probably true" that race played no part in these other practices. *See* note 54, *supra.*

Assuming *arguendo* that the Board bears a lesser degree of persuasion with respect to its second burden,

it could not meet it. The district court's conclusions concerning the use of optional zones demonstrate that "the 'neighborhood school' concept has not been maintained free of manipulation" by the Dayton Board. *Keyes,* 413 U.S. at 212. In the face of plaintiffs' *prima facie* case of intentional segregation, the Board had to show that its "neighborhood school" practices were part of "a consistent and resolute application of racially neutral policies" (*Oliver* v. *Michigan State Board of Education,* 508 F.2d 178, 182 (6th Cir. 1974)), rather than part "of a policy to create or maintain segregation in" the Dayton public schools. *Keyes,* 413 U.S. at 214. The Board's assertion of a racially neutral "neighborhood school" policy to justify its school-construction, grade-structure-reorganization, and pupil-transfer practices necessarily fails, because the segregative use of optional zones is so inconsistent with the defense. In the words of the district court, the optional-zone practices "destroy or dilute the neighborhood school concept" (A.13), and, with it, the Board's asserted non-racial explanation.[55]

Because of the Board's inability to meet its second burden, plaintiffs are also entitled to "all-out desegregation," unless the Board can show that its practices "were not factors in causing the . . . condition of segregation" which existed throughout the Dayton school district at the time of trial. *Keyes,* 413 U.S. at 214. No such showing was attempted or made below. In view of the Board's decision in 1972 to reinstate segregation system-wide and its refusal ever to take action to overcome the *de jure* segregation inherited at the time of *Brown,* the Board cannot show, under any evidentiary standard, "that a lesser degree of segregated schooling in the [Dayton public schools] would not have resulted even if the Board had not acted as it did." *Keyes,* 413 U.S. at 211. To the contrary, in view of the substantial contribution of the Board's various practices to the pattern of school segregation, it is undeniable that these past segregative acts were "factors" causing, creating or contributing to the segregated condition of the Dayton schools. *Keyes,* 413 U.S. at 211, 214.

In sum, the Board was not and is not able to show that the "pattern of intentional segregation" (*Keyes,* 413 U.S. at 210) was limited, isolated, or otherwise not a contributing factor to the extensive, across-the-board racial segregation of pupils present until this school year. The Board having failed to rebut plaintiffs' *prima facie* case, the lower courts had the duty, which they fulfilled, to "decree all-out desegregation" (*id.* at 214) of the Dayton public schools.

III. THE SYSTEM-WIDE DESEGREGATION PLAN ORDERED BELOW DOES NOT IMPOSE A FIXED RACIAL BALANCE AS A MATTER OF SUBSTANTIVE CONSTITUTIONAL RIGHT, AND THE PLAN CONTAINS NO OTHER IMPERMISSIBLE FEATURES.

The foregoing two arguments establish plaintiffs' right to a remedial plan of system-wide pupil desegregation to uproot the system-wide violation. That re-

[55] The Board's use of optional zones thus shows the inconsistent application of allegedly "neutral criteria" which must be viewed skeptically in evaluating asserted justifications for *prima facie* discriminatory conduct. *Cf. Shapiro* v. *Thompson,* 394 U.S. 618, 634-38 (1969). Here, as in *Keyes,* "the mere assertion of such a ['neighborhood school'] policy is not dispositive where, as in this case, the school authorities have been found to have practiced de jure segregation in a meaningful portion of the school system by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation." 413 U.S. at 212.

solves the major dispute between the parties in this Court. However, the Board also raises two additional, general objections relating to particular aspects of the district court's remedial orders and to the impact of the plan itself. The first branch of the Board's claim is that the district court has ordered a "fixed racial balance" and that, although nowhere so stated by the courts below, the Board will be required to readjust attendance patterns every year in perpetuity in order to maintain such a balance. Pet. Br. at 27-30, 32-35.[56] Second, the Board argues that the plan approved below is impermissible on pragmatic grounds, apparently because the trend of white parents and children leaving the city of Dayton during recent years for reasons wholly unrelated to school desegregation will not cease under the desegregation plan implemented this school year. Pet. Br. at 35-37.

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[56] The Board also argues (Pet. Br. at 30-32) that the plan ordered below contravenes the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* This contention, as is at least part of the Board's "racial balance" argument (*see* note 57, *infra*), is based exclusively on the premise that there is no system-wide constitutional violation requiring a system-wide remedy. If the premise is wrong, as we have shown in Arguments I and II, *supra*, then the Board's claims under the 1974 Act fall with the premise. We do not understand the Board to contend otherwise in this Court, as they also did not in the courts below. In any event, 20 U.S.C. § 1702(b) expressly states that the 1974 Act is "not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." *Cf. Drummond* v. *Acree*, 409 U.S. 1228 (1972) (Powell, Jr., in Chambers); *Swann*, 402 U.S. at 16-18. The court of appeals in *Brinkman II* correctly construed the Act in accordance with its terms. A.95. The Board's constitutional and statutory arguments stand or fall together.

A. The Courts Below Did Not Order A Fixed Racial Balance Either For Now Or For Ever.

1. We have previously set out in full the relevant parts of the court of appeals' decision in *Brinkman III* (A.121-23) rejecting petitioners' "fixed racial balance" argument. *See* pages 53-54, *supra*. We think that disposition was correct in all respects.

After three rounds of evidentiary hearings the district judge had acquired considerable familiarity with the Dayton school system, and he had heard uniform testimony to the effect that Dayton was a relatively easy system to desegregate and that there were no major obstacles to system-wide actual desegregation. *See* pages 43-52, *supra*. His general directive that each school in the system should approximate the system-wide racial ratio, within plus or minus 15%, was therefore not an arbitrary, inflexible requirement arrived at in an uninformed vacuum. And it most certainly did not represent a determination that plaintiffs were entitled to have each school balanced to a fixed percentage as a matter of substantive constitutional right.[57] The district court provided that its "plus or

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[57] The Board correctly relies on *Milliken* v. *Bradley*, 418 U.S. 717 (1974), for the proposition that a judicially-perceived undesirable racial balance is not a substitute for an actual constitutional violation. Pet. Br. at 27-28. As we have shown in the previous two arguments, however, there is present here a system-wide constitutional violation calling for a system-wide remedy. Petitioners also criticize the district court's reference to a "constitutional right" of schoolchildren to "share equally all facilities of a school system, both the superior and the inferior." A.102. Whatever this means, and we think the court of appeals speculated as accurately as one can (A.122-23, and pages 53-54, *supra*), what the district court *ordered* was "actual desegregation" "to dismantle [the] dual school system." *Swann*, 402 U.S. at 22, 24. There is no indication that the language in question was anything other than another

minus 15%" requirement would not be applied to the 10th and 11th high school grades, and the orders provided that "where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis." A.104; *see also id.* at 106.

Against this background the "15% plus or minus" requirement was a valid guideline, and the burden was clearly on the Board to come forward with specifics if it thought the guideline was not workable with respect to either the system as a whole or to particular schools in the system. It is dispositive, in our view, that the Board has never—not in the district court, not in the court of appeals, and not in this Court—identified a single school or set of schools that could not be feasibly desegregated under the district court's guidelines. *See Swann,* 402 U.S. at 27-31. The Board also failed to come forward with a specific plan which attempted

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imprecise, off-hand statement characteristic, unfortunately, of the district court's opinions. As with other such imprecision or misunderstanding on the part of the district court, the court of appeals properly condemned any implication in this statement that might be read to create a right "which the federal courts have never recognized." A.122. The court of appeals faithfully adhered to this Court's admonition against ordering any particular degree of racial balance as a matter of substantive constitutional right. *Swann,* 402 U.S. at 24. The court below also carefully reviewed the proceedings, context and actual plan ordered to insure that the plan itself and the actual judgment were not infected by any such unconstitutional implication. A.121-123. The situation here is thus readily distinguishable from the one in *Spangler, supra,* where this Court found that an unclear but facially valid district court judgment became infected with an impermissible factor by a statement, made in the course of reinterpreting the judgment several years later, which imposed a fixed racial ceiling on the schools' pupil enrollments to be maintained "at least during [the district judge's] lifetime." 427 U.S. at 433.

to justify the maintenance of any one-race school or set of schools as being "genuinely nondiscriminatory." *See Swann,* 402 U.S. at 26. Instead the Board places sole reliance on its claim, refuted above, that there is no system-wide violation.

In *Swann,* this Court reviewed a similar district court order which directed "that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . [and] [t]hat pupils of all grades [should] be assigned in such a way that as nearly as practicable the various schools at various grade levels have about the same proportion of black and white students." *See* 402 U.S. at 23. With respect to the Charlotte-Mecklenburg Board's argument that the district court there had imposed a "fixed racial balance" requirement, this Court noted: "The fact that no such objective was actually achieved—and would appear to be impossible—tends to blunt that claim. . . ." *Id.* The Court nevertheless recognized that the district court's language at issue there was susceptible to the construction urged by the Board, and the Court held: "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." *Id.* at 24. But the plan actually approved in that case provided only "that student bodies throughout the system would range from 9% to 38% Negro" (*id.* at 10); and the Board there, as the one here, had defaulted in its obligation to propose an acceptable plan, causing the district court there, as here, to designate Dr. Finger "to assist the District Court to do what the

Board should have done" *Id.* at 25.[58] This Court approved the order in these words (*id.*):

> We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement. From that starting point the District Court proceeded to frame a decree that was within its discretionary powers, as an equitable remedy for the particular circumstances. . . . In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

The "15% plus or minus" *language* employed by the district court in the instant case is considerably more flexible than the "79-29" language employed by the district court in *Swann*. And the 30% total deviation allowed by the terms of the district court's order in this case is slightly greater than the 29% deviation contained in the *actual plan* approved by the district

[58] The Board's default and failure here are greater than that of the Board in *Swann*. As the court of appeals held in *Brinkman II*, the "free choice" plan proposed by the Board for yet another school year, 1975-76, did "not even purport to dismantle Dayton's one-race schools"; "the basic pattern of one-race schools will continue largely unabated." A.93. The Board's plan as implemented maintained 22 schools 90% or more black and 17 schools 90% or more white. A.588. In *Swann*, by comparison, "[t]he final board plan left 10 schools 86% to 100% Negro and yet categorically rejected the techniques of pairing and clustering as part of the desegregation effort." 402 U.S. at 24 n.8. As in *Swann*, therefore, the Board with its 1975-76 plan utterly failed to meet its burden, in view of the system-wide violation (*see* Arguments I & II above), "to satisfy the courts that [these virtually one-race schools'] racial composition is not the result of present or past discriminatory action on their part." *Id.* at 26. Further delay in fashioning an adequate remedy in light of the Board's default was surely not tolerable. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann*, 402 U.S. at 14.

court in *Swann*. Moreover, the actual plan implemented below pursuant to the district court's order has resulted in a much greater deviation than that approved by the Court in *Swann*. An October 14, 1976 report published by the Research Division of the Dayton Board's Department of Management Services (attached hereto as Appendix B), reveals that the plan as implemented contains the following maximum deviations: at the elementary level, the Webster school has the smallest proportional black pupil population at 30.2%, compared with the highest black pupil proportion of 75% at the Jackson primary, for a total range at the elementary level of 44.8%; at the high school level the comparable range is 29.1% black at Belmont high school to 72.4% black at Dunbar high school, for a total high school range of 44.3%.[59] This is not racial balance; it is typical desegregation. The Board's "fixed racial balance" argument is therefore devoid of both factual and legal merit.

2. The second prong of the Board's "racial balance" objection is that the courts below have imposed "a

[59] Excluded from these comparisons are some small schools (e.g., the 100% black Weaver school with 29 total pupils, the 9.7% black Gorman school with 93 pupils) which do not fit the normal enrollment patterns.

We observe from Appendix B what appears to be a continuing racial pattern in pupil assignments: most of the former all-black or virtually all-black schools remain predominantly white. One of the Board's own experts testified that such a pattern, which retains the former racial identity of the schools, would not constitute effective desegregation of the Dayton system. A.300. By defending in this Court the desegregation orders entered below, we do not intend to waive any proper objections that might be made to the plan *as implemented by the Board*. In accordance with the decisions of this Court, the district court has retained jurisdiction "until it is clear that disestablishment [of the dual system] has been achieved." *Raney* v. *Board of Education, supra*, 391 U.S. at 449.

fixed racial formula" that "is a permanent ratio so that adjustments of student assignments would be required each year as long as the system exists to maintain the ratio in each school." Pet. Br. at 34. Therefore, argues the Board, the plan approved below violates the strictures of this Court's decision in *Pasadena City Board of Education* v. *Spangler, supra.*

In *Spangler* this Court disapproved a district judge's remedial order requiring implementation of a plan under which "no majority of any minority" would be present in any school, which the district court had subsequently determined to mean "at least during [his] lifetime." *See* 427 U.S. at 433. This Court held that "in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school, the District Court exceeded its authority." *Id.* at 435.

No comparable provision or requirement has ever been entered by the district judge, nor contained or intimated in any statement ever made by him, in the instant case. The court of appeals scrutinized this record for language conflicting with *Spangler,* and could find none: "The short answer to this argument is that the judgment directs no changes after the 1976-77 school year." A.123. The court of appeals further directed: "If adjustments to this plan are sought by any of the parties in future years the district court will necessarily consider the limitations of *Spangler* in dealing with such requests." A.123. The Dayton Board's argument to the contrary before this Court is based on unfounded speculation and is incorrect.

B. The Board's Resegregation Argument Is Wrong.

The Board argues that the plan ordered below "will not work" because "[t]he record establishes that during the five years this case has been in the courts 11,000 white and 900 black students have left the Dayton system." Pet. Br. at 37. From there the Board leaps to the conclusion that the actual desegregation plan approved below will cause resegregation of the city's schools, and that such a plan should therefore not be approved. This is a specious proposition.

First, there is not a whit of evidence showing that the declining pupil population in Dayton over the years *prior* to this school year has had anything to do with school desegregation. *See* A.301. Such a showing is impossible, because prior to this school year there has been no meaningful school desegregation in the district. A.588-589.

Second, this Court has consistently rejected the argument that school desegregation should be limited in order to accommodate community hostility. The Court so held in *Brown II,* again in *Cooper* v. *Aaron,* 358 U.S. 1 (1958), and most recently in *Monroe* v. *Board of Commissioners, supra.* Here, as in *Monroe,* the Board's argument "reveals its purpose. We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether." 391 U.S. at 459. In *Monroe,* the Court answered that argument (*id.*) by quoting *Brown II,* 349 U.S. at 300: "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." The Dayton Board should be given the same answer.

Finally, it is important to recognize what the Board's argument is not. It is not the Board's position, for example, that a different but equally effective plan of system-wide pupil desegregation would be more acceptable to the community and would result in greater actual desegregation than the plan approved below (which the Board was allowed to implement in any fashion it chose so long as actual pupil desegregation occurred). And it is not the Board's position, for further example, that a different but equally effective desegregation plan could be devised that would minimize the non-school causes for the residential flight from Dayton proper to its suburbs. Whether or not judicial consideration of "white flight" in either of those circumstances, or in similar circumstances, would be permissible, is thus not before the Court in this case. Rather, the Board's argument simply is that the judgment below should be set aside because of speculation that a demographic trend which started when the schools were segregated will continue under the school desegregation plan ordered below. That demographic trend is regrettable, in our judgment, but it is a problem with which federal judges are not required to deal in the context of a school desegregation case. What they can and must deal with, however, is unlawful school segregation. The judges below have done that: they are due to be affirmed, and the Board's "it won't work" objection (belied by the figures in Appendix B, attached hereto) is due to be rejected.

IV. PLAINTIFFS HAVE STANDING TO BRING THIS CASE IN THEIR OWN RIGHT AND AS REPRESENTATIVES OF THE CLASS.

After "five years of litigation" of a clearly adversary nature between very real parties in interest, petitioners argue that this school desegregation case should be dismissed without further ado because the named plaintiffs are "curious bystanders" who have no stake in the outcome of this litigation. Pet. Br. at 38. Petitioners' charge goes too far. There must be very few, if any, school cases in which the record of the local black community's challenge to intentional segregation of their public schools has been any longer or more open and unrelenting. *See, e.g.,* A.358-59 (PX. 9), 456-57 (PX. 13A), 459-61 (PX. 13N). And probably in *no* school case has there been as much testimony from as many "eyewitnesses" to and "victims" of the *de jure* segregation practices of their local school board. *See, e.g.,* A.181-191, 197-199, 200-208, 208-215, 220-221, 221-223, 238-240, 290-291; R. I. 352-384, 536-563, 741-750, 795-817. *Cf. Smith* v. *Board of Educ.,* 365 F.2d 770, 777 (8th Cir. 1966) (Blackmun, J.). Petitioners' suggestion that these courageous Dayton citizens are an "anonymous collection" who have no more standing to bring this suit than "to file a similar law suit against every school board in the United States" (Pet. Br. at 39) is not credible.

As a matter of law, petitioners' procedural claim is also wrong. As with some of the other issues raised by petitioners, however, resolution of this claim may appear somewhat more difficult than it really is, due to the nature of the proceedings below. In summary, named black and white plaintiffs, 6 parents and 13

children, filed their complaint on April 17, 1972, alleging that they "are parents or minor children thereof attending schools in the Dayton public school system" who seek a racially non-discriminatory system of public schooling "on behalf of themselves and others similarly situated." Complaint, ¶ 2. The succeeding paragraph of the complaint made general class-action allegations under Rule 23, FED. R. CIV. P. On July 24, 1972, petitioners (the Board and four of its members) filed their answer specifically responding to some of the complaint's allegations (but not the one in question), and generally denying "each and every other allegation contained in the complaint of plaintiffs." Answer, ¶ 5. On July 24, 1972, three defendant board members filed an answer generally admitting the allegations of plaintiffs' complaint. Prior to trial the parties submitted briefs on the standing and class action issues. On November 13, 1972, the defendant Superintendent of the Dayton public schools filed his answer and, "based upon a search of the records of the school system, personal recollection and staff information," admitted the allegations.

During the November 1972 evidentiary hearing many black school administrators, teachers and parents, some with children in the Dayton public schools (e.g., R. I. 361, 370-373), testified on behalf of plaintiffs to their personal injury from and challenges to the Dayton Board's racially discriminatory policies and practices beginning as early as 1912 and continuing through the date of trial. No named plaintiff testified; however, the Board offered no proof from the records within its possession, or otherwise, to rebut its Superintendent's admission (based upon his search of

the school district records) to named plaintiffs' allegations concerning their status in the Dayton public schools.

In its February 7, 1973 decision, the district court determined: "[t]his is a school desegregation suit brought as a class action by the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education." A.1. In the face of this determination adverse to their position, the Dayton Board claimed on its appeal, *inter alia*, that plaintiffs had failed to show any stake in the controversy sufficient to maintain the action on behalf of themselves or the class of black school children in Dayton, Ohio. Although the court of appeals did not separately discuss the issue in *Brinkman I*, it held that "all contentions of the parties contrary to the conclusions reached in this opinion have been carefully considered and are found to be without merit." A.69. The Board did not petition this Court for review of that judgment. On remand to the district court, on plaintiffs' second appeal to the Sixth Circuit in *Brinkman II*, on the Board's first petition for review in this Court, or further proceedings pursuant to the second remand to the district court, and on the Board's appeal to the Sixth Circuit in *Brinkman III*, the Board never again raised any claim that plaintiffs lacked standing to maintain this action on behalf of themselves or the class.

We recognize that the law of the case is a discretionary rule subject to modification in the interests of justice, particularly in this Court (*see generally* 1B MOORE'S FEDERAL PRACTICE ¶ 4.04 (2d ed. 1974)), and we recognize that standing, in its "case or contro-

versy" dimension, is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth* v. *Seldin,* 422 U.S. 490, 498 (1975). But there is no reason at this late date to set aside the final determination by the district court and the court of appeals in *Brinkman I* that plaintiffs have standing to bring this action in their own right and as class representatives. The parties (including the plaintiffs) and the courts below have relied on this determination, and the Board has not since controverted it until now. It would be a manifest injustice to hold that plaintiffs do not have standing to maintain this action merely because they relied on the lower courts' final determination in *Brinkman I,* rather than seek to reopen the record to supplement the proof in prescient anticipation of an issue to be raised in a future petition for certiorari.

In contrast, the Board has offered no affirmative reason why it should not be bound by the *Brinkman I* determination on the issue, after choosing not to seek review in this Court and never again raising the issue below. *Cf. Pasadena City Bd. of Educ.* v. *Spangler,* 427 U.S. at 432.[60] Surely these circumstances adequately explain why the courts below have provided "no explanation of just why this contention of the Dayton Board is without merit. . . ." Pet. Br. at 38. This explanation is especially adequate since the original decision on plaintiffs' standing in *Brinkman I* was supported by the defendant Superintendent's unrefuted judicial admission of plaintiffs' status based

[60] In *Spangler* this Court noted that "de do not have before us any issue as to the validity of the district court's original judgment, since petitioners' predecessors did not appeal from it." 427 U.S. at 432.

on his search of the school system's records (*cf.* Rule 801(d)(2), FED. R. EVID.), and since the interest of the plaintiff class in the controversy was shown by such extensive testimony to be "real and immediate," not "conjectural" or "hypothetical." *Cf. Sosna* v. *Iowa,* 419 U.S. 393, 403 (1975).

In any event, in order to resolve all possible doubts at this juncture, the first time and the first court where the issue has been controverted by petitioners since they chose not to seek review from the *Brinkman I* decision, we have filed with the Court affidavits of the parents of 11 of the named plaintiff children. The parents affirm that all 11 children were students in the Dayton Public Schools at the time of the filing of this action and that six of them still attend the Dayton public schools, five having since graduated.[61] Under *Spangler,* 427 U.S. at 430, named plaintiffs therefore have standing to maintain their action to secure a racially unitary system of public schooling in Dayton, Ohio, regardless of whether the district court's determination of the class is as definite as one might wish under Rules 23(c)(1) and (c)(3), FED R. CIV. P. *Cf. Board of School Commissioners of City of Indianapolis* v. *Jacobs,* 420 U.S. 128, 130 (1975).[62] Unlike

[61] For example, as set forth in the March 27, 1977 affidavit of plaintiff C. R. Walker, Jr., a black citizen of these United States, his three plaintiff children at the time of trial attended the Weaver school, one of the "mixed" schools converted in the West-Side Reorganization. *See* pages 16-18, *supra.* His children now attend the McFarlane elementary school, which this school year is not a 100% black school for the first time in its long history since opening in 1932 as the blacks-only Dunbar school.

[62] The need for precision in the definition of the class in this case is not as great as in *Jacobs,* 420 U.S. at 130, because there is considerably less likelihood of mootness. The issue here concerns

the *Spangler* circumstances, named plaintiffs still in the Dayton public schools have a sufficiently personal stake in this litigation to maintain the action, even if

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the system of intentional segregation from which plaintiff children may suffer immediate and continuing constitutional injury for up to 13 school years or more, not school authorities' periodic infringement on particular high school students' free-speech rights. Moreover, unlike *Spangler* where named plaintiffs sought to desegregate only high schools (*see* 415 F.2d 1242 (9th Cir. 1969)), the complaint here prayed for system-wide relief without limitation; therefore, the Board understood from the beginning of this action that the plaintiffs sought to eradicate *de jure* segregation and racial discrimination from all aspects of the Dayton public schools. In any event, the district court's determination of the class as "the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education" (A.1) is sufficiently definite and comprehensible within the contemplation of Rule 23. *See* Notes of the Advisory Committee on 1966 Amendments to Rule 23, 3B MOORE'S FEDERAL PRACTICE, at pp. 23-28. Finally, because this case has *not* been mooted by the graduation of the individual plaintiff children and the controversy therefore does continue between named plaintiffs still in the Dayton public schools and the petitioners, any deficiency in this class determination can be cured, either by this Court or the courts below under their continuing jurisdiction of the case. *Cf.* Rule 23(c)(1); *Senter* v. *General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976); *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40, 51 (5th Cir. 1974), *cert. granted*, 44 U.S.L.W. 3670 (U.S. May 24, 1970).

Of course, school desegregation cases are appropriately maintained as class actions; they are the *archetype* for Rule 23(b)(2) actions. *See* Notes of the Advisory Committee on 1966 Amendments to Rule 23, *supra*. But even a single school-attending child or his parent, black or white (*see Whitely* v. *Wilson City Bd. of Ed.*, 427 F.2d 179 (4th Cir. 1970); *cf. Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Barrows* v. *Jackson*, 346 U.S. 249 (1953)), surely has standing to maintain this action to root out official racial discrimination throughout the Dayton public schools. This is so because the individual plaintiff's right is not to attend a particular school but rather to "a racially non-discriminatory system of schooling." *Brown II*, 349 U.S. at 301. That is, "to attend schools which, near or far, are free of governmentally imposed ra-

some may think that their older brothers and sisters who have graduated since the filing of this lawsuit do not. To the end of this litigation, then, there must unfortunately be, and there is, a controversy between plaintiffs and the Board over the Fourteenth Amendment rights of black schoolchildren in Dayton, Ohio.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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cial distinctions . . ."; the individual plaintiff's school desegregation action is directed at the "system-wide policy of racial discrimination." *Potts* v. *Flax*, 313 F.2d 284, 288-290 & n.4 (5th Cir. 1963).

APPENDIX

APPENDIX A

Here we summarize the evidence relating to the Dayton Board's policies and practices in the areas of (1) school construction, closing and site selection, (2) grade structure reorganization, and (3) pupil transfers and transportation. With respect to these items, the court of appeals in *Brinkman I* determined that plaintiffs "have raised serious questions" as to the district court's failure to include these practices "within the cumulative violation." A.67. For reasons set forth in the main part of this brief (*see* notes 46 & 14, *supra*), we do not think these questions need to be answered in order to sustain the judgment below. We present this Appendix if we are wrong in our view of the case, in which event the Court may wish to address these reserved issues instead of remanding for consideration by the court of appeals in the first instance.[1]

1. School Construction, Closing and Site Selection

The Board's school-construction, school-closing and site-selection policies and practices over the past two decades failed to alleviate the condition of state-imposed segregation extant at the time of *Brown*. To the contrary, the Board's policies and practices in these areas impacted the dual system and literally sealed it in. In the period of expansion of the school system from the late 1940's to the mid-1960's, the overwhelming majority of new schools and

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[1] The Board's representation that plaintiffs on the prior appeals "begged" the Sixth Circuit to decide these reserved issues because we "have long since recognized that the only way to avoid the conclusion that the remedy is disproportionate to the wrong and therefore inequitable" (Pet. Br. at 27), is not accurate. We did, however, suggest that a decision on the independent unconstitutionality of the practices discussed in this appendix is the surest way to put permanently to rest the Board's incessant objections to a system-wide remedy. But we have never intimated, nor do we now intimate, that plaintiffs' right to system-wide relief depends on the disposition of these reserved issues.

additions to schools were located by the Board in either virtually all-black or virtually all-white areas, and attendance boundaries were drawn or maintained so that new schools and expansions of existing facilities opened as virtually one-race schools. A.241-246, 277-78. Of 24 new schools constructed between 1950 and the present, 22 opened 90% or more black or 90% or more white. A.242, 316-17 (PX4). During the same expansion period, additions to existing facilities followed the same pattern. 78 of some 86 additions of regular classroom space, for which racial compositions are known, were made to schools 90% or more one race at the time of the expansion; only nine additions were made to schools less than 90% black or white. A.277-78. The race-oriented nature of these practices is made crystal clear by the coordinate assignment of professional staffs to these schools and additions tailored to the racial composition of the pupils. A.316-17 (PX4); A.275; R.I. 1824-26, 1860.[2]

A few examples will suffice to illustrate the racial underpinnings of this complex process. For example, in 1962 the Willard and Garfield schools, previously designated for blacks only, were closed and the old blacks-only Dunbar high school building was converted into McFarlane elementary. Most of the children from the Willard and Garfield attendance areas were simply assigned to the McFar-

[2] Plaintiffs' expert, Dr. Gordon Foster, testified that such school construction patterns "by and large . . . took the place of changing zone lines in terms of maintaining existing racial patterns and compacting them" A.285. Mr. Bagwell, the Dayton Board's chief rebuttal witness with respect to school construction, admitted that "in effect then, when you . . . put an addition to a school, that as far as that space is concerned, you determine the boundaries and they are coextensive with the original boundaries of the school. . . . So that if a school is already 100 percent black and you are making an addition to that school, you in effect have determined the boundaries to be . . . creating a hundred percent black school unit." A.288. The same is true with respect to the virtually all-white or all-black primary units, as well as one-race additions. A.249-50.

lane school which opened, certainly to no one's surprise, with an all-black pupil population and an all-black faculty. Some children from the Willard and Garfield areas were also assigned to the all-black Irving and Miami Chapel elementary schools. At the same time, a newly constructed Dunbar high school, located in a black neighborhood at the fartherest corner of the school district away from substantial white residential areas, opened with a virtually all-black student body and faculty. *See* Statement, *supra*, at note 10. Thus, a major new element was added to the dual system and, although there was some juggling within, the color line remained basically intact.

Another example of a lost opportunity to accomplish desegregation occurred upon the closing of the Central school in the mid-1960's. The boundaries of the schools on the east side of Central were basically preserved with the result of maintaining the white identity of those facilities. Boundaries for an all-white school in the north were extended south to take in the northern half of the old Central zone in a proverbial "dog leg" which took in only the white areas of the zone. An area in the south end of the old Central zone containing a small black population was made an optional area, which crossed the river, between the virtually all-black Irving school and the all-white Emerson school. PX49 (1965 attendance zone overlay); PX46C (1960 census map).

A final example, presenting the converse of the above examples, relates to the Board's failure to utilize excess capacity to the maximum efficiency as pupil populations declined by over 10,000 following their peak year in the mid-1960's. Even conservative estimates at the time of trial indicated that the Board could have closed down 9 or 10 average-size elementary schools. A.246-47, 489-98 (PX56). Such closings would have presented the Board with substantial opportunities to accomplish significant savings in costs, and at the same time accomplish substantial deseg-

regation.[3] But rather than closing selected black and white schools and reassigning pupils to accomplish actual desegregation, the Board elected the more costly segregative option of keeping these under-utilized schools open and maintaining their racial identity.

2. Grade Structure and Reorganization

As previously noted, the Board persistently refused to alter grade structures by pairing schools to accomplish pupil desegregation. *See* Statement, *supra* at pp. 29-30. Likewise, the differential grade structure involved in the construction of primary units, and the grade organizations of the Dunbar high school (prior to 1962) and the Patterson high school (prior to 1968-69 school year) have perpetuated and compounded school segregation. *See* Statement, *supra,* at notes 10 & 22.

The Board acted in similar fashion in the 1971-72 school year when it reorganized the grade structures of some 20 elementary schools from K-8 to K-5, 6-8. This grade reorganization program presented an important opportunity for the Board to accomplish substantial desegregation by judicious selection of sites, alterations of feeder patterns, and the establishment of the new attendance zones for both the middle (6-8) and elementary schools (K-5) affected. A.376-87 (PX10). Yet, in the face of recommendations from the State Department of Education of alternatives for accomplishing substantial desegregation, and the development of a pupil locator map so that there

[3] There would be substantial cost savings with repect to such closings, even if substantial pupil transportation were required to accomplish school desegregation conveniently and safely for the children. According to the Board, the average yearly per pupil transportation cost on Board-owned buses is $50.00, while the average yearly per pupil cost for simply maintaining a pupil space in a school is $140.00. (Nos. 33 & 33A of plaintiff's Requests for Admissions (served October 13, 1972), admitted by both the Board and the Superintendent and Board minority.)

could be no doubt about the racial impact of its actions, the Board implemented a plan which reimposed segregation at three middle schools and their feeder elementaries, increased racial segregation at another middle school, and accomplished some desegregation at the fifth middle school. A.453-54 (PX12). The Board's actions thus resulted in "increasing or maintaining segregation as opposed to availing the opportunity of decreasing it." A. 276. The Ohio State Department of Education was of a similar view; it notified Dayton school authorities that the middle school reorganization program "has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren." A.454 (PX12).

3. Pupil Transfers and Transportation

Prior to the West-Side Reorganization in 1952 (*see* Statement, *supra,* at pp. 15-18), the Dayton Board regularly transferred (and provided transportation where necessary to) white children from the attendance areas of black schools, past or away from other all-black schools to "whiter" schools. R.I. 1953-55. And thereafter, the Board utilized optional zones to provide white children with an equally effective means of transferring out of the core black schools to "whiter" schools. *See* Statement, *supra,* at note 12. And the city-wide Dunbar and Patterson high schools operated in similar fashion. *See* Statement, *supra,* at notes 10 & 22.

In addition, curriculum, hardship and disciplinary transfers have functioned in many instances to assign white children from black schools to "whiter" schools. R.I. 807-10, 696; A.218-19. Two prime examples are the use of curriculum transfers by white students under the Freedom of Enrollment plan (A.218-19), and the emergency transfers of students in 1969 involving the Roth and Stivers high schools. A.272, 469-70, 474. This latter incident takes on additional significance because it occurred

in connection with the only time prior to trial that the Board redrew an attendance boundary to accomplish desegregation. This was accomplished by adding some of the all-black Roosevelt and Dunbar attendance areas to the predominantly white Stivers high school. R.I. 1253, 1255-57. In the very first year following this realignment, racial problems at Stivers, as well as at the predominantly black Roth, led to the transfer of 34 black students out of Stivers to the all-black Dunbar or Roosevelt schools, and 36 white students out of Roth to the virtually all-white Meadowdale, Stivers, Kiser and Fairview high schools. None of the white children transferred were assigned to black schools; and none of the black children transferred were assigned to white schools. R.I. 1259-66.

Overall, hardship, emergency and special education transfers were also carried out in such a way as to reflect and reinforce the underlying racial duality in pupil assignments. A.273. During the 1972-73 school year, for example, 266 (or 70%) of the 377 black children transferred were assigned to black schools, and 155 (or 91%) of the 171 white children transferred were assigned to white schools. A.379-80 (PX16F).

Throughout the post-*Brown* period, non-resident pupils attending the Dayton system on a tuition basis were assigned in a similarly racially dual fashion: white pupils were assigned to white schools (A.231-32), and black pupils were assigned to black schools. A.201. The assignment practices relating to several hundred white high school pupils from Mad River Township, who attended the Dayton system on a tuition basis throughout the 1950's, is illustrative. These students were assigned to the virtually all-white Stivers, Kiser, Wilbur Wright, and Belmont high schools. When the Board felt there might be capacity problems at the schools, the Board did not consider assigning these non-resident pupils to the black Dunbar, Roosevelt or Roth high schools, which had ample space.

Instead, the Board notified the Mad River Township school district that space would be unavailable for these tuition pupils in the 1960's. A.231-33, 475; R.I. 1928-31. In all of the various forms of pupil reassignment, it was the unbroken practice of the Board *never* to reassign white pupils to identifiably black schools. A.232.

An additional, classical segregative technique utilized by the Dayton Board was "intact" busing. There are two examples. First, in 1963 white children from the Ruskin school were transported intact (i.e., teacher and class as a unit) into separate one-race classes at the racially mixed Central school. R.I. 586-87. The second instance occurred in 1968 when the black Edison School was partially destroyed by fire. These black children were transported to a number of white schools throughout the city. But they remained as segregated as if they had been transferred to all-black schools, because they were accommodated in the white transferee schools in separate intact classes. A.201-03; R.I. 1069-71.[4]

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[4] Significantly, intact busing was not the Board's first alternative with respect to reassigning the Edison children. As Assistant Superintendent Harewood, the first black in the Board's central administration, recounted the incident, the first proposal under consideration was to house these black children in neighborhood churches. This proposal was abandoned only under pressure from Mr. Harewood, who pointed out that there were vacant classrooms in other schools in the city. Then, without further consultation with Mr. Harewood, the decision was made to transport self-contained black units into the white schools. A.201-02; R.I. 582-84. The next Fall, the new Superintendent of Schools ordered that the "intact" aspect of these reassignments be terminated. Upon later examination however, he found that the black children were still being segregated within the white schools under somewhat more subtle "tracking" procedures, and he again ordered that the children be fully integrated. R.I. 1071-72. Thus, only through pressure from a new Superintendent and from Mr. Harewood was the "intact" brand of racial discrimination terminated, and the Edison children integrated into the white schools to which they had been reassigned. Also at this time, predominantly

Thus, for several decades Dayton school authorities have transported children for a variety of reasons. But, with only a few hard-fought exceptions, children have never been transported in such a fashion as to accomplish desegregation; with singular consistency, the Dayton Board's transportation practices have maintained, reinforced and/or exacerbated racial segregation.[5]

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black groups of children from the over-crowded Jefferson school were assigned by non-contiguous zoning to a number of white schools. R.I. 848, 850; PX 122. These small amounts of actual, although only one-way, desegregation were short-lived, however. Instead of expanding the use of these desegregative alternatives, the Edison and Jefferson reassignments were terminated for the 1971-72 school year and the black children were resegregated into the rebuilt black Edison school (and by then, the black McFarlane middle school), and the black Jefferson school. A.231. The segregative effect of these reassignments is shown by the following chart comparing the percentage black of the receiving white schools (*see* PX 122) in the 1970-71 school year to that existing in the 1971-72 school year:

School	*% Black 1970-71*	*% Black 1971-72*
Ft. McKinley	9.6	1.6
Loos	9.5	6.0
Horace Mann	11.1	0.7
Shiloh	7.4	0.9
Shoup Mill	13.9	1.4
Velerie	20.0	13.5

[5] Although transportation has been used only twice (*see* note 4, *supra*) for desegregation purposes, pupil transportation has not been an uncommon event in Dayton. For many years white children in the far northwest, northeast and southeast areas of the system were transported to white schools in those areas (A.230-31), and, of course, black orphan children were transported all the way across town to the all-black Garfield school (*see* Statement, *supra,* at note 7.)

Ohio law requires that local school authorities make transportation available, and the Dayton Board so acts, for students who are assigned to schools beyond a prescribed distance from home. A.228, 289.

Finally, the Board's Freedom of Enrollment policy, as it existed at the time of trial, was, at best, a washout as a desegregative technique. Under this policy, students residing in an attendance area were given first priority to attend that school; second priority was given to students requesting transfer to a school for a specially available course; and the third priority was given to children requesting transfers and whose enrollment would improve the racial balance in the receiving school. A.466-67 (PX 16B). The first priority merely froze in the pattern of segregation which began two-thirds of a century ago. The second priority actually contributed to school segregation because it was used by whites to transfer from black schools to white schools. A.218.[6] Under the third priority, 459 black children transferred in the 1972-73 school year to white schools, thereby accomplishing some actual desegregation; but only one white child, formerly in a parochial school matriculating into a 54.3% black high school, made a racial balance transfer. A.478 (PX16D), 273. Hence, transfers under the Freedom of Enrollment policy were exclusively one-way—i.e. some blacks and some whites transferring to white schools—and had a negligible if not retrogressive impact on the racially dual pattern of pupil attendance.

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[6] In the 1972-73 school year, for example, 22 of 23 white students transferring under the Freedom of Enrollment policy were transferred to white schools. A.478 (PX 16D).

APPENDIX B

ETHNIC ENROLLMENT BY SCHOOLS

Dayton Public Schools
October, 1976

School	Total Enrollment								% Black							
	1963-64	1969-70	1971-72	1972-73	1973-74	1974-75	1975-76	1976-77	1963-64	1969-70	1971-72	1972-73	1973-74	1974-75	1975-76	1976-77
Jane Addams	600	668*	578*	541*	530*	515*	472*	452*	41.6%	78.7%	81.7%	78.7%	86.6%	88.9%	90.5%	58.2%
Allen	574	668	629	622	606	566	576	504	0.6	0.1	0.6	0.6	2.3	2.1	2.4	36.9
Belle Haven	1180	1091	994	871	928	885	876	956	0.0	5.7	10.3	17.7	26.6	33.2	39.0	48.4
Belmont Elem.	794	635	542	554	527	522	520	380	0.0	0.0	0.0	9.4	10.4	7.5	9.0	43.2
Brown	1177	1130	1067	980	1046	1009	976	865	0.5	0.8	1.0	2.2	2.9	2.9	5.4	49.4
Carlson	244	626	574	519	500*	489*	467*	440*	95.9	99.7	99.5	99.0	98.4	100.0	99.8	65.9
Cleveland	1180	1335	1246	1150	1119	1109	1038	819	0.0	0.1	0.3	0.8	0.9	0.6	0.6	44.3
Cornell Heights	890	894	784	800	767	743	722	563	0.0	59.1	72.3	80.5	86.7	88.8	92.7	59.0
Drexel	700	679*	601	597	551	543	540	398	3.5	4.3	6.5	8.2	9.1	7.6	6.3	42.2
Eastmont	950	792	607	542	527	470	520	425	0.0	0.0	0.0	0.7	0.9	1.1	19.4	42.1
Edison	800	532*	645*	603*	525*	692*	593*	548*	80.0	98.3	99.7	99.7	99.2	99.9	99.3	62.2
Emerson	1000	992*	816*	749*	685*	567*	520*	317*	0.0	13.6	5.6	8.9	10.1	12.2	10.6	38.5
Fairport	780	877	841	748	778	878	866	925*	0.0	4.6	39.7	59.1	78.1	85.2	89.8	61.2
Fairview Elem.	667	811	741	734	753	758	679	847	1.0	3.7	7.4	14.6	22.2	25.3	31.8	48.9
Ft. McKinley	510	473	451	425	—	—	—	—	0.0	2.5	1.6	2.6	—	—	—	—
Franklin	691	862	632	584	560	565	520	604*	0.0	0.0	0.0	0.3	0.4	0.5	0.0	39.2
Gardendale	176	282*	553*	554*	519*	532*	504*	295*	7.9	43.3	72.3	78.9	80.0	82.7	83.9	59.3
Gettysburg	630	632	598	576	609	590	558	516	0.0	6.6	14.5	22.7	37.4	51.2	57.7	63.6
Grant	917	699	649	610	552	533	475	415	0.0	0.9	0.6	0.3	0.7	0.6	0.6	47.0
Grace A. Greene	715	555*	579*	453*	338*	—	—	—	89.5	97.5	96.5	96.2	100.0	—	—	—
Hawthorne	316	263	329*	275*	262*	—	—	—	0.0	0.0	30.1	28.0	33.2	—	—	—
Hickorydale	565	487	432	471	513	521	520	454	0.0	10.3	15.5	32.5	44.2	54.1	61.9	69.2
Highview	807	812*	710*	635*	554*	440*	355*	561*	82.0	98.2	97.9	96.7	96.0	94.3	93.5	63.3
Huffman	834	1022	899*	775*	722*	662*	638*	513*	0.9	3.4	0.1	0.1	0.3	0.3	0.6	32.0
Irving	1035	749*	780*	656*	525*	399*	382*	—	96.6	100.0	99.5	99.2	99.8	99.2	99.0	—
Jackson Elem.	1147	785	726	692	607	551	506	276	98.5	99.5	99.4	99.9	99.7	99.3	99.2	53.6
Jackson Prim.	537	707*	677*	630*	596*	547*	485*	316*	96.2	99.2	99.1	99.7	99.5	99.8	99.2	75.0
Jefferson Elem.	1284	841	860	807	720	688	590	568*	1.2	80.3	91.3	94.9	96.1	96.1	96.9	52.1
Jefferson Prim.	—	661	719	724*	735*	668*	693*	550*	—	72.0	88.0	93.5	94.7	96.4	97.5	70.2
Kemp	725	631	568	515	452	467	472	436	0.0	0.0	7.2	7.0	7.5	8.1	8.5	45.9
Lewton	600	543	471	451	418	422	393	303	0.0	0.0	0.4	5.8	10.0	8.1	6.4	36.0
Lincoln	1145	1019	966	885	866	863	775	654	0.0	0.2	1.0	0.6	0.1	0.2	0.5	32.4
Longfellow	850	991	838	875	826	758	739	686	5.8	50.2	60.7	64.1	69.9	72.3	74.6	66.0
Loos	785	719	631	606	633	639	592	470	1.9	5.0	6.0	5.8	5.2	6.7	8.1	47.7
MacFarlane	1229	1222*	921	772	658	633	527	858	99.6	99.9	99.5	99.6	100.0	100.0	99.8	54.7
Horace Mann	435	355	284	255	236	218	249	213	0.0	7.0	0.7	3.1	5.5	4.1	27.3	54.9
McGuffey	925	858	850*	774*	662*	620*	629*	721*	0.0	18.9	32.0	41.6	47.9	55.6	60.9	34.5
McNary	—	498	423*	409*	412*	410*	360*	337*	—	98.8	100.0	100.0	100.0	100.0	99.7	69.1

School	Total Enrollment 1963-64	1969-70	1971-72	1972-73	1973-74	1974-75	1975-76	1976-77	% Black 1963-64	1969-70	1971-72	1972-73	1973-74	1974-75	1975-76	1976-77
Meadowdale Elem.	930	671	522	508	754	706	691	768	0.0%	12.8%	8.2%	12.6%	12.3%	10.6%	13.0%	58.6%
Miami Chapel	793	722	481*	410*	398*	380*	500*	610*	99.6	99.6	100.0	99.8	100.0	100.0	79.4	67.4
Patterson/Kennedy**	650	603	619*	726*	659*	586*	563*	466*	0.0	0.0	0.3	4.0	3.8	3.8	5.9	47.0
Residence Pk. Elem.	1112	746	702	660	654	592	536	437	80.0	99.2	99.7	99.8	99.5	98.5	98.5	60.0
Residence Pk. Prim.	—	383	449	457	411	357	342	286	—	99.5	99.8	100.0	99.5	99.4	98.5	70.6
Ruskin	1171	927*	834*	756*	733*	741*	714*	682*	0.0	4.3	0.1	0.5	0.1	0.5	0.4	52.2
Shiloh	490	645	550	537	548	486	442	284	2.4	6.0	0.9	8.4	14.2	15.4	17.4	53.9
Shoup Mill	318	336	207	184	—	—	—	316	0.9	13.4	1.4	3.8	—	—	—	62.3
Louise Troy	781	724*	592	567	530	504	467	507	99.8	99.7	99.7	99.1	100.0	100.0	100.0	71.8
Valerie	—	483	342	375	452	442	415	403	—	17.4	13.5	24.0	30.3	35.5	42.2	55.3
Van Cleve	770	780	760*	754*	634*	887*	842*	782*	0.9	1.7	14.9	20.2	19.6	28.4	31.5	51.2
Washington	650	703*	634*	628*	575*	576*	534*	418*	23.0	16.6	14.5	15.3	15.5	16.5	15.4	50.2
Weaver	1260	1118*	1001*	838*	605*	524*	457*	29*	98.8	100.0	99.7	99.5	100.0	99.6	99.8	100.0
Webster	531	537	493	502	527	551	547	540*	0.1	0.6	0.4	1.0	1.3	5.6	4.8	30.2
Westwood	1900	1467*	1318*	1190*	1008*	955*	877*	801*	94.7	99.5	99.5	99.7	99.5	99.5	99.5	68.5
Whittier	925	801*	748	615	576	533	408	643*	95.6	99.3	99.5	99.3	99.7	99.4	100.0	56.9
Wogaman	1100	1034*	988*	971*	967*	963*	916*	725*	100.0	100.0	99.8	100.0	100.0	100.0	99.7	66.5
Orville Wright	750	758	963	929	915	870	781	499	0.0	0.8	6.7	8.1	8.2	6.9	8.3	61.7
Gorman	102	108	101	85	85	86	112*	93	15.6	17.6	11.9	11.8	10.6	14.0	14.3	9.7
Kennedy**	144	181	153	—	—	—	—	—	13.8	11.0	15.7	—	—	—	—	—
Home Teaching	—	—	—	—	—	—	24	43	—	—	—	—	—	—	37.5	53.5
Belmont H.S.	1768	2003	2039	2056	2020	2094	2256	1829	0.0	0.5	2.7	5.2	5.3	6.8	7.6	29.1
Dunbar	1180	1471	1369	1357	1012	990	1283	1408	92.7	99.4	100.0	100.0	99.8	99.8	99.7	72.4
Fairview H.S.	1252	1396	1426	1426	1421	1365	1471	1028	0.9	9.3	19.1	24.1	35.0	43.2	58.3	55.7
Kiser	740	744	731	773	739	688	880	783	2.7	5.4	6.4	9.8	16.1	13.5	24.4	30.3
Meadowdale H.S.	1154	1750	1828	1866	1986	2145	2033	1653	0.0	1.4	5.2	10.6	22.7	33.7	40.6	35.6
Roosevelt	1850	1703	1691	1539	1393	1148	—	—	94.5	99.8	99.9	100.0	100.0	100.0	—	—
Roth	1120	1291	1191	1183	1068	1071	1204	1321	53.5	94.8	96.5	95.8	94.3	98.8	99.4	69.4
Stivers-Patterson																
Patterson Bldg.	1020	1659	1764	1737	1236	1297	1371	1453	1.8	22.2	31.0	32.9	36.9	40.8	48.3	56.7
Stivers Bldg.	1150	1074	1247	1216	1217	1184	1268	1093	2.6	3.9	12.3	14.0	29.7	44.2	60.6	60.9
Colonel White	1668	1741	1727	1501	1449	1245	1330	1534	1.1	28.9	45.9	54.6	60.0	60.7	65.2	65.5
Wilbur Wright	1334	1332	1350	1397	1571	1593	1590	1558	3.3	4.2	5.5	9.2	12.2	12.0	14.9	38.1
Totals (inc. Pre-K)	57,007	58,287*	55,041*	52,162*	49,028*	47,031*	45,181*	41,177*	31.1	39.3	42.7	44.6	46.3	47.5	48.9	52.7
Totals (exc. Pre-K)				50,798	47,683	45,733	44,165	40,257				43.6	45.4	46.5	48.3	52.0

* Includes Pre-School in building

** Figures listed for Patterson/Kennedy include both Patterson and Kennedy for school years 1972-73 through 1976-77

Department of Management Services
Division of Research
10/14/76